

## Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)

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*This Article provides a qualitative empirical analysis of third-party closing opinion practice. This practice has recently generated some controversy because, among other reasons, many of the transactions at issue in Enron were supported by closing opinions. Interviews with lawyers around the nation suggest that the traditional academic view of opinion practice—that it promotes economic efficiency—is helpful but incomplete. Many features of closing opinion practice persist despite perceived inefficiencies. Moreover, non-market actors, such as the bar associations—not private innovation—appear to be the chief engines of improvement. Based on these interviews, the Article offers some initial thoughts as to why the practice exists and what functions it may perform.*

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In addition to the usual disclaimer about errors and omissions (they are mine, alone), I wish to make the following disclosures. First, from 1992 to 1995, I was associated with the law firm of Kirkland & Ellis, one of the firms discussed briefly in this article. Second, I have held several leadership positions with the Business Law Section of the American Bar Association, an organization that has exercised influence in the development of legal opinion practice. Finally, I am a consultant and possible expert witness in a case involving legal opinions. Nevertheless, the views expressed here are entirely and exclusively my own, and are intended to be impartial. © Jonathan C. Lipson 2005.

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## Third-Party Closing Opinion Practice

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*"Too much time, effort and money are expended on third-party legal opinions."*<sup>1</sup>

*"In rendering legal opinions, lawyers conduct themselves as if their professional lives were on the line."*<sup>2</sup>

*"A legal opinion hits nerve centers in every direction."*<sup>3</sup>

*"When I want your opinion, I'll give it to you."*<sup>4</sup>

### INTRODUCTION

Why do lawyers ask for and give third-party closing opinions?

Few practices among U.S. lawyers are more curious—or (curiously) less studied by legal scholars<sup>5</sup>—than this. Third-party closing opinions are writings

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1. Business Law Section of the State Bar of California, *Report on Third-Party Remedies Opinions* (2004), at 1, available at [http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/opinions/2005-01\\_remedies-opinion.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/opinions/2005-01_remedies-opinion.pdf) [hereinafter *California 2004 Report*].

2. SCOTT FITZGIBBON & DONALD W. GLAZER, *LEGAL OPINIONS* § 1.1, at 4 (1992). This leading work on third-party closing opinions has been superseded by a second edition, DONALD W. GLAZER ET AL., *GLAZER AND FITZGIBBON ON LEGAL OPINIONS IN BUSINESS TRANSACTIONS* (2d ed. 2001). [I will refer to the first edition as "FITZGIBBON, OPINIONS," and the second edition and its 2006 Cumulative Supplement as "GLAZER, OPINIONS."].

3. James Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1295, 1316 (1978).

4. Samuel Goldwyn (quoted in <http://www.cinerhama.com/jewish/goldwyn.html>) (last visited Jan. 11, 2006).

5. There has never been a full-blown theoretical or empirical attempt to understand this odd and important artifact of legal practice. There have been several useful articles that consider opinion practice in passing. See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 274-77 (1984); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996). A 1992 article in the University of Missouri-Kansas City Law Review considered how legal opinions might be used in the law school classroom. See Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 UMKC L. REV. 23 (1992). Moreover, Professor Schwarcz has recently offered a defense of lawyers issuing opinions in one type of transaction, structured financings. See Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1 (2005). There is also a rich body of doctrinal and practical literature discussed in Part I, *infra*. Yet, there has (until now) been little effort to ask the most basic question: Why do lawyers engage in this practice at all?

Why academics have failed to study it is easier to understand. To the extent that academics will have practiced law, they are unlikely to have had a transactional practice, much less one at a level of sophistication involving the requesting or giving of third-party closing opinions. See generally Richard

(typically in the form of a letter) from the lawyer to one party in a transaction (e.g., the borrower) to the other party (e.g., the lender).<sup>6</sup> At their simplest, closing opinions focus on three matters: (1) the “authority” of the subject of the opinion (the “Company”) to engage in the transaction, (2) the enforceability of the transaction contracts against the Company, and (3) assurances that the transaction (and perhaps the Company) is not in violation of any applicable law or contract.

While the volume of third-party closing opinions is difficult to gauge, they are viewed as a “fixture of the American legal scene,”<sup>7</sup> and are routinely delivered in financings, mergers and acquisitions, stock issuances, and other large, complex transactions.<sup>8</sup> A recent bar association report observed that “every week . . . hundreds, if not thousands, of third[-]party legal opinions are delivered at closings for business transactions.”<sup>9</sup> Yet, lawyers frequently complain that opinions create needless costs and risk without adding much value. Thus, opinion-writing poses a simple question: why have it at all?

The explanation thus far has principally been economic: closing opinions ostensibly reduce information asymmetries by compelling the production and verification of information that enables parties to price their transactions more

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E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 596 (2003). That academics have not engaged in the practice does not—and should not—render it less curious and worthy of study.

6. See The TriBar Opinion Committee, *Third-Party “Closing” Opinions*, 53 BUS. LAW. 592, 606 (1998) (“At the closing of many business transactions, counsel for one party to the transaction will deliver a letter to the other party expressing its conclusions on various matters of legal concern to that other party.”) [hereinafter *TriBar 1998 Report*]. This report, as well as many others, was authored by the “TriBar Committee,” a committee of lawyers devoted to developing standards in closing opinion practice. The TriBar Committee has “exercised great influence over the years, due not only to the importance of New York in capital markets, but also to the consistent high quality of its work product.” See Ad Hoc Committee on Third-Party Legal Opinions, Business Law Section of the Washington State Bar Association, *Report on Third-Party Legal Opinion Practice in the State of Washington*, at 4 n.3 (1998) (reprinted in GLAZER, OPINIONS, *supra* note 2, at app. 2) [hereinafter *Washington State Report*]. The TriBar Committee’s original contribution was *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979) [hereinafter *TriBar 1979 Report*]. Other TriBar efforts include *An Addendum—Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981); *Second Addendum to Legal Opinions to Third Parties: An Easier Path*, 44 BUS. LAW. 563 (1989); *Special Report of the TriBar Opinion Committee: The Remedies Opinion*, 46 BUS. LAW. 959 (1991). The TriBar’s most recent contribution is the *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483 (2004) [hereinafter *TriBar Remedies Report*]. The background of the TriBar Committee is discussed in Part IV.A.2, *infra*.

7. GLAZER, OPINIONS, *supra* note 2, § 1.1, at 2.

8. A recent report by the Business Law Section of the California Bar Association observed, based on an informal study, that the enforceability term of the closing opinion letter (sometimes called a remedies opinion) is “almost always requested by lenders in loan transactions exceeding \$100 million.” *California 2004 Report*, *supra* note 1, app. 4, at 1 n.4. This report indicates that the enforceability opinion is given in merger and acquisition transactions involving \$10 million or more (at least among privately-held companies) and in many private securities transactions. *Id.*

9. Committee on Legal Opinions, ABA Section of Business Law, *Law Office Opinion Practices*, 60 BUS. LAW. 327 (2004) [hereinafter *Opinion Practices*].

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accurately.<sup>10</sup> In the vernacular, closing opinions are part of the “due diligence” process that occurs in most business transactions.<sup>11</sup> Yet, the evidence, which includes interviews with lawyers around the country, tells a more complex story.<sup>12</sup> On the one hand, attorneys acknowledge that certain aspects of certain opinions—in particular the opinions on authority and the absence of impediments to the deal—may add value in just this information-enhancing way. Moreover, and more subtly, lawyers routinely speak about the role of closing opinions in economic terms. For example, a recent report of the Business Law Section of the State Bar of California on the enforceability opinion—often the most controversial portion of the closing opinion—explicitly calls for the creation of a “cost-benefit framework for determining the appropriateness of requesting an enforceability opinion in a transaction.”<sup>13</sup>

On the other hand, the economic explanation is incomplete for at least three reasons. First, unscrupulous clients have perpetrated famous financial frauds despite the issuance of closing opinions, suggesting that they may not produce important information when it matters most. For example, Judge Harmon, presiding over the securities fraud suits against Enron’s lawyers,<sup>14</sup> and the Enron examiner,<sup>15</sup> both characterized legal opinions as important in the chain of alleged wrongdoing.

Nor is Enron unique. Famous frauds in the *National Student Marketing*

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10. See Gilson, *supra* note 5, at 275-76. As discussed further below, Gilson developed in this article a view that lawyers are (or should be) “transaction cost engineers” who “devis[e] efficient mechanisms which bridge the gap between capital asset pricing theory’s hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this world.” *Id.* at 255.

11. “When received, the closing opinion serves as a part of the recipient’s diligence, providing the recipient with the opinion giver’s professional judgment on legal issues concerning the opinion giver’s client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.” See Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, § 1.1, at 875 (2002) [hereinafter *ABA 2002 Guidelines*]; see also Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) [hereinafter *Accord*]. The ABA promulgated in the *Accord* a series of guidelines on opinion practice, later supplemented by the *ABA 2002 Guidelines*. [hereinafter *ABA 1991 Guidelines*].

12. The methodology of these interviews is described in the Appendix to this Article. In order to preserve the confidentiality of the records, while maintaining the integrity of the data, I have identified the attorneys in code, and will cite to the transcripts of the interviews in the following manner: “Interview with Attorney A-1 (date), transcript at [ ].”

13. *California 2004 Report*, *supra* note 1, at 1, 6 (“[T]he benefits [of a remedies opinion] must warrant the time and expense required to prepare the opinion.”), app. 4.

14. The opinions at issue in the *Enron* case appear to have been “true sale” or “true issuance” opinions, which are elaborations on the more generic authority, enforceability, and no-violations opinions. *In re Enron Corp. Sec. Lit.*, 235 F. Supp. 2d 549, 704 (S.D. Tex. 2002) (denying law firm’s motion to dismiss charges of primary violations under § 10(b) of the Securities Exchange Act of 1934 because, among other things, the firm “drafted ‘true sales’ opinions that Lead Plaintiff asserts were essential to affect many of the allegedly fraudulent transactions.”). It is not clear that these were third-party opinions, at least in a conventional sense. The role that closing opinions played in the *Enron* case is discussed in Parts II.B & III.C, *infra*.

15. See *In re Enron Corp.*, Final Report of Neal Batson, Court-Appointed Examiner, at 48-55, app. C, at 179-202, annex 1, at 25-31 (on file with author) [hereinafter *Enron Final Report*].

*Corp.*<sup>16</sup> and *OPM*<sup>17</sup> cases, among others, were also perpetrated despite the presence of third-party closing opinions.<sup>18</sup> These cases suggest that, in the right (or wrong) circumstances, closing opinions may not merely fail to deter fraud; they may actually abet it, especially if the lawyer has given the opinion knowing of the client's malfeasance.

Second, even without fraud, lawyers acknowledge that closing opinion practice often fails to enhance in a cost-effective way the quality or quantity of information produced. Closing opinions are usually heavily qualified and, in the case of the enforceability opinion, typically require the less-expert lawyer to offer the opinion, even though he or she would not be its "least-cost" producer. A number of lawyers observe that closing opinions often serve little purpose at all; they are given simply because they are "on the checklist."<sup>19</sup> Lawyers thus suggest that opinion practice may exist in its current form for purposes less wholesome than the production of information. It may exist, for example, as a kind of "deal insurance" by exposing the opining attorney to potential liability if the deal has failed and there turns out to be a defect in the opinion.<sup>20</sup>

Third, and most curiously, opinion practice appears to resist market-based change. This is surprising, since Gilson's economic model would predict that negotiated transactions should result in enhanced efficiencies over time. Thus, clients and lawyers should waive or modify third-party closing opinions to the extent that they do not add informational value. Yet, while it appears that the market does play some role in the development of opinion practice, it also appears that the chief engines of adaptation are bar associations, which produce voluminous reports and forms which solve problems that the market does not or cannot fix.<sup>21</sup> This suggests that, so far as the market is concerned, the costs of private innovation in this context are perceived to be *more* than the resulting gains.<sup>22</sup>

Why might that be? Although the evidence is preliminary and qualitative (and therefore subjective), it appears that non-economic social forces, not just the market, shape closing opinion practice. Interviews with attorneys suggest

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16. See *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

17. GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 304-08 (3d ed. 1999) (discussing *Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor, In re O.P.M. Leasing Servs., Inc.*, No. 81 B 10553 (Bankr. S.D.N.Y. Apr. 25, 1983)).

18. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1046-67 (2004) (discussing frauds in these cases).

19. See discussion *infra* Part IV.A.2.

20. Cf. GLAZER, *OPINIONS*, *supra* note 2, § 1.3.2, at 11 ("Another benefit sometimes ascribed—wrongly—to an opinion letter is that it serves as an insurance policy.").

21. Exactly how influential these reports are is an empirical question that might be addressed in a future survey of a broader group of practitioners than was interviewed for this Article.

22. Cf. Gilson, *supra* note 5, at 253 ("As long as the costs of innovation are less than the resulting gains, private innovation to reduce the extent of market failure creates value.").

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that inefficiencies in closing opinion practice might stem from its path-dependent character (e.g., opinions are given simply because they are on “the checklist”), as well as the “pride”—assertions of self and status—of the lawyers (and clients) involved in (or affected by) the practice.<sup>23</sup> Thus, the title of this Article: “Price, Path and Pride.” The thesis of the Article is that we can only begin to understand third-party closing opinion practice in the United States by recognizing that it reflects both economic (price) and non-economic (path and pride) considerations.

Closing opinions are likely to become more, not less, controversial in the coming years. Many of the lawyers interviewed for this project said that they thought that lawyers were becoming increasingly attractive litigation targets when transactions failed, and that opinion letters would form an important link in the chain leading to liability. Moreover, pressure to create increasingly complex transaction structures<sup>24</sup> will likely demand that lawyers issue more, perhaps riskier, closing opinions. If the trend identified by the lawyers interviewed for this project bears out, lawyers may have far greater exposure than they are prepared to absorb.

This Article has four major Parts and an appendix that describes the empirical methods used. Part I summarizes Professor Gilson’s theory of legal opinion practice, and uses it to propose a framework for analyzing closing opinions. Parts II and III apply this framework to lawyers’ observations about those aspects of opinion practice that (respectively) do and do not add value. Part IV develops a supplemental explanation based on the practice’s path-dependent and socially-contingent nature. The Article concludes with suggestions for further work in this important but comparatively under-studied area.

#### I. PRICE—A THEORY OF VALUE

To date, the principal explanation for closing opinion practice has been economic: third-party closing opinions exist because, like other aspects of business lawyering, they should provide value to the parties in excess of the cost of their preparation. The challenge, however, is that while “[a]ll legal opinions add cost to transactions . . . not all legal opinions add commensurate value.”<sup>25</sup> Given the ubiquity of opinion practice, it would be unusual if third-party opinions in fact added no economic value to the transactions of which they are a part. How, then, might they in fact add value?

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23. Both concepts (path dependence and social pride) are explained in Part IV, *infra*. Practical examples of the “checklist” are discussed in, among others, JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS (1975).

24. See, e.g., Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1.

25. *Washington State Report*, *supra* note 6, at 10.

*A. Transaction Cost Engineering*

Professor Gilson's *Value Creation* model is a good place to start.<sup>26</sup> There, Gilson set out to answer the important and basic question: What value—if any—do business lawyers generally add to the transactions on which they work?<sup>27</sup> If lawyers do not, in fact, add value to the transaction in the aggregate, their work is at best “[besides] the point”<sup>28</sup> and possibly destroys (by consuming) value that would otherwise flow to the parties, themselves.

Gilson began by considering and rejecting two common hypotheses about the value that business lawyers might create: (1) that a lawyer may improve her client's deal, even at the expense of the other party, by redistributive bargaining; and (2) that a lawyer reduces regulatory costs.<sup>29</sup> He rejected the first because he observed that the important economic question was not whether business lawyering increases a particular party's share, but whether the overall value of the transaction increases due to the lawyer's contributions. If business lawyers engaged only in redistributive bargaining, rational clients would rarely use lawyers because “net of lawyers' fees, the surplus from the transaction to be divided between the clients would be smaller as a result of the participation of the lawyer, rather than larger.”<sup>30</sup> He rejected the second explanation—regulatory arbitrage—because, he claimed, it “does not get us far enough.”<sup>31</sup> There are, he argued, simply too many lawyered transactions in which regulation plays little role for this to be a persuasive explanation.<sup>32</sup>

Gilson argued instead that business lawyers are “transaction cost engineers” who, in a variety of ways, reduce the difference between the value that capital assets would obtain in a perfect market (i.e., on the capital-asset pricing model) and the price actually agreed-to in the imperfect world that clients occupy:

Lawyers function as transaction cost engineers, devising efficient mechanisms which bridge the gap between capital asset pricing theory's hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this

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26. See Gilson, *supra* note 5. Gilson's analysis of business lawyering was at the time considered a new and important development. See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 397 (1985).

27. Gilson, *supra* note 5, at 243 (“Precisely how do the activities of business lawyers affect transaction value?”).

28. *Id.* Of course it is easy to imagine that clients believe that increasing their slice of the pie does produce value—for them. See, e.g., Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer's View of the Law & Economics Literature*, 74 OR. L. REV. 189, 195 (1995) (“Contract lawyers, who are properly concerned only with the well being of their clients, frequently fail to understand that a reduction in joint costs can benefit their client perhaps because, in practice, many actions that increase the value of a transaction as a whole decrease the value of a transaction to one of the parties.”).

29. Gilson, *supra* note 5, at 245-46.

30. *Id.*

31. *Id.* at 247.

32. See *id.* (“[B]usiness lawyers frequently function in a world in which regulation has made few inroads.”). This is an empirical question that many business lawyers might challenge.



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world. Value is created when the transactional structure designed by the business lawyer allows the parties to act, for that transaction, as if the assumptions on which capital asset pricing theory is based were accurate.<sup>33</sup>

For Gilson, closing opinion letters are one such “efficient mechanism.” Gilson argued that third-party opinion letters (as with business lawyering in general) can reduce information asymmetries (and therefore produce value) in two important ways: (1) by producing information; and (2) by providing a bonding mechanism by which the information can be verified.

#### *1. Information Production*

Often, the parties will be the best producers of information about themselves. Thus, the seller of a business will know a great deal (or at least more than the buyer, *ex ante*) about the value of the business. Gilson, however, recognized that the “[p]roduction of certain information concerning the character of the seller’s assets and liabilities simply requires legal analysis.”<sup>34</sup> Thus, Gilson argued, seller’s counsel will typically provide an opinion to the buyer on a variety of matters relating to the sale because seller’s counsel is the “least-cost producer of the information in question.”<sup>35</sup> Producing a third-party opinion, he argued, is simply part of the process of producing information that will lead to a better transaction for all. “For example,” Gilson writes:

[D]etermination of the seller’s proper organization and continued good standing under state law, the appropriate authorization of the transaction by seller, the existence of litigation against the seller, the impact of the transaction on the seller’s contracts and commitments, and the extent to which the current operation of the seller’s business violates any law or regulation, represent the production of information which neither the buyer nor the seller previously had, by a third-party—the lawyer—who is the least-cost producer [of the information].<sup>36</sup>

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33. *Id.* at 255. The “capital asset pricing” theory posits, in part, that markets will, over time, correctly price assets. *Id.* at 251. If the theory held, “business lawyers cannot increase the value of a transaction. Absent regulatory-based explanations, the fees charged by business lawyers would decrease the net value of the transaction.” *Id.* As Gilson acknowledges, the CAPM is not without its critics, who question many of its assumptions, including that its two parameters—risk and return—are the only ones of significance. *Id.* at 251 n.31 (collecting citations of criticisms of the CAPM). Nevertheless, Gilson argues, the value of the CAPM is “normative: It describes why the factors it specifies [i.e., risk and return] should count.” *Id.*

34. *Id.* at 274.

35. *Id.* at 276.

36. *Id.* at 275. As discussed below, there may be problems with this description of the function of a legal opinion. First, an opinion that the seller’s business violates no laws or regulations would run afoul of the ABA’s 2002 *Guidelines*. See *ABA 2002 Guidelines*, *supra* note 11, § 4.3, at 880 (“[A]n opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client’s contractual obligations.”). As Glazer notes, “[a]n opinion on the company’s, as opposed to the transaction’s, compliance with law is far too broad.” GLAZER, *OPINIONS*, *supra* note 2, § 13.3, at 463. Second, Gilson emphasizes only the authority and no-violations opinions—not the more controversial enforceability opinion. As discussed in Part III.A, *infra*, it will be much harder to support a claim that the enforceability opinion given by the seller’s counsel creates value on this model, unless seller’s counsel also drafted the purchase and sale agreement.

The advantage of this mode of information production, Gilson argued, is that it “provides a non-adversarial approach to resolving the conflict” over the content of the opinion.<sup>37</sup> It is non-adversarial, he argues, because “reducing the cost of information necessary to the correct pricing of the transaction is beneficial to both buyer and seller.”<sup>38</sup> Rather than argue about many of the things that often concern lawyers who ask for and give opinions—the form of the opinion, for example—lawyers should principally be concerned with “the cost of producing the information” required by the transaction.<sup>39</sup>

## 2. *Verification—Reputation Bonding*

Third-party closing opinions may also reduce information costs in another way, by creating a mechanism for verifying the information produced in the transaction. Gilson argued that transactional techniques commonly deployed to verify information—indemnification provisions, hold-backs, earnouts—are imperfect because they do not entirely eliminate the potential for opportunism inherent in one-time transactions,” such as asset sales.<sup>40</sup> The solution, he suggests, lies in the reputational bond effectively posted by the lawyer. Unlike the parties (who may expect no future involvement with one another, and for whom final-period opportunism may be quite attractive), Gilson suggests that professionals reliably post their reputations as a bond—act as reputational intermediaries<sup>41</sup>—because they expect future work. “If the intermediary cheats in one transaction—by failing to discover or disclose seller misrepresentations—its reputation will suffer and, in a subsequent transaction, its verification will be less completely believed.”<sup>42</sup>

Legal opinions are, according to Gilson, an important tool in creating the lawyer’s reputational value.<sup>43</sup> The legal opinion would perform this function, Gilson argued, by having the lawyers state that they “are not aware of any factual information that would lead us to believe that the [asset purchase] agreement contains an untrue statement of a material fact or omits to state a fact necessary to make the statements made therein not misleading.”<sup>44</sup> This is a

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37. Gilson, *supra* note 5, at 275. As discussed below, interviews with lawyers suggest that under certain circumstances, negotiations over the scope of the opinion can be quite adversarial.

38. *Id.* at 275-76. Although beyond the scope of this paper, it would appear that this supposes, among other things, the absence of strategic behavior by either or both parties. As noted below, it would seem that recipient’s counsel often demands provisions in opinions that do not necessarily enhance the information produced.

39. *Id.* at 276 (“Debate over the scope of the opinion should focus explicitly on the cost of producing the information.”).

40. *Id.* at 288-89.

41. *Id.* at 290.

42. *See id.*

43. *Id.* at 291 (“[A] particular opinion often required of the seller’s lawyer . . . most prominently highlight[s] the reputational intermediary role played by [lawyers].”).

44. *Id.*

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curious choice because, among other reasons, it is not clear that it is an appropriate opinion to give in an asset sale (the type of transaction Gilson was describing). Rather, as the ABA's 2002 Guidelines indicate, "such a negative assurance opinion . . . is unique to securities offerings . . . ." <sup>45</sup> It is "appropriate only when it is required for that purpose in connection with a . . . securities offering . . . ." <sup>46</sup>

Nevertheless, while this particular opinion may not be given in asset sale transactions, the "central characteristic" of this (or any other) legal opinion is said to be that "a third party who has been intimately involved in the seller's production of information for the buyer does not believe the seller has misled the buyer." <sup>47</sup> By giving such an opinion, Gilson concludes, "it is quite clearly the lawyer's reputation—for diligence and honesty—that is intended to be placed at risk." <sup>48</sup>

#### *B. A Framework for Assessing Closing Opinion Value*

Taking Gilson's analysis seriously, and applying it to what lawyers say about opinion writing, would be aided by the development of a framework for assessing the value of opinion letters. Such a framework would account for and develop the two basic features of Gilson's model—information production and information verification. The framework I have chosen, and which I apply in the next part, considers three factors: (1) whether the opinion (whether a particular clause or the entire document) is relevant to the reasonable expectations of the parties (expectation factor); (2) whether the opinion is about matters largely within the expertise of the lawyer giving the opinion (legal factor); and (3) whether the specific attorney asked to provide the opinion is the person best suited to do so (the division of labor factor).

The significance of the first factor is axiomatic on an economic analysis. Parties that are free to contract should be permitted to realize their reasonable expectations. <sup>49</sup> If, however, an opinion is not relevant to these expectations, it is not likely to add information that has value. The second and third factors introduce the complexities of transacting through professional agents. The costs of these agents should be associated with their comparative advantage. <sup>50</sup> To add

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45. ABA 2002 Guidelines, *supra* note 11, § 4.5, at 880.

46. *Id.*

47. Gilson, *supra* note 5, at 292.

48. *Id.* (internal footnotes omitted).

49. See, e.g., ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1-5 (1979); see also Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 761, 763-64 (1975).

50. I use the term "comparative advantage" in a general sense, not in the more specialized way used by international law experts. See, e.g., Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998); cf. Economics A-Z, <http://www.economist.com/research/Economics/alphabetic.cfm?LETTER=C#COMPARATIVE%20AD>

informational value, legal opinions should reflect either pure law, or facts of a largely legal character. If, instead, closing opinions merely regurgitate information that could be more cheaply (or more authoritatively) produced by someone else (for instance, the client), the opinion would present economic problems.

## II. PRICE—WHAT THE LAWYERS SAY

Closing opinions appear to fulfill the informational aspirations of the price model in two respects. First, closing opinions are thought to aid the due diligence process. Lawyers indicate that the due authority and no-violations opinions often do this. Second, and emanating from the first point, closing opinions may perform a market-signaling function, telling the world (or at least others who might take an interest in the transaction) in shorthand that sufficient diligence occurred to enable the lawyer to give the opinion. Both functions of opinions add value because (and to the extent that) they produce and verify information that is (1) relevant to the reasonable expectations of the parties, (2) about matters uniquely within the expertise of a lawyer, and (3) issued by the attorney in the best position to do so.

The economic explanation of closing opinions is not just important for theoretical reasons; it also dominates lawyers' discussions of the practice. Lawyers and clients speak in consciously economic terms about the merits (or the lack of merits) of opinion practice. The California Bar's 2004 Report on enforceability opinions, for example, orients its answers to these questions almost exclusively around a cost-benefit analysis, arguing that "a remedies opinion should only be sought when its benefit justifies its cost."<sup>51</sup> While lawyers do not exclude other explanations for the propriety and roles of opinions, they appear to give preference to the economic analysis. This is interesting both because, as discussed below, certain aspects of opinion practice appear to persist despite economic inefficiencies, and because non-market factors—in particular, the bar associations—tend to correct for (or explain) these inefficiencies.

### A. Due Diligence

Information production through the due diligence process is often said to be the leading cause of—and cure for—third-party closing opinions. "At its best," the TriBar Opinion Committee has reported, "the opinion preparation process can serve to clarify and improve transactions."<sup>52</sup> It is worth noting that this

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VANTAGE ("In essence, the theory of comparative advantage says that it pays countries to trade because they are different.") (last visited Mar. 14, 2006).

51. *California 2004 Report*, *supra* note 1, at 1, 6, app. 4, at 2, 4-8.

52. *TriBar 1998 Report*, *supra* note 6, at 666; *ABA 1991 Guidelines*, *supra* note 11, at § 1.B(2)

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statement refers not to the opinion itself as being the instrument of clarification, but instead “the process” of preparing the opinion. “When received,” the *ABA 2002 Guidelines* observe, “the closing opinion serves as a part of the recipient’s diligence, providing the recipient with the opinion giver’s professional judgment on legal issues concerning the opinion giver’s client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.”<sup>53</sup> Glazer and FitzGibbon, authors of a leading practitioner’s treatise, also indicate that closing opinions play an important role in helping parties manage transactional expectations.<sup>54</sup>

Due diligence has no precise meaning. It is often associated with disclosures to be made in connection with securities offerings under the Securities Act of 1933.<sup>55</sup> Although closing opinions are frequently rendered in transactions with few federal securities law implications (e.g., loans and asset sales), lawyers recognize the role that closing opinions play in producing information as part of the due diligence process. “[T]he legitimate reason [for an opinion],” one attorney observed, “is that somebody forces somebody to do the homework . . . [to m]ake sure all the i’s are dotted and the t’s are crossed and things like that.”<sup>56</sup> Writing a third-party closing opinion is “not diligence in kind of a mechanical verification sense, but rather in the broader sense. At one level it is asking for a professional, independent confirmation in the way of a second set of eyes.”<sup>57</sup>

Although closing opinion letters are not generally regulated, they have become fairly standardized in forms that are widely available. Most third-party closing opinions will address some or all of the three basic questions about

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(“[T]he proper purpose of a third-party legal opinion is to assist in the Opinion Recipient’s diligence.”); see also *California 2004 Report*, *supra* note 1, at 1 (“The remedies opinion, like third-party legal opinions generally, can serve as an important part of the opinion recipient’s ‘diligence’ about the transaction.”).

53. *ABA 2002 Guidelines*, *supra* note 11, § 1.1, at 875. As noted in Part IV.B, *infra*, just because the recipient considers the information important does not mean that the opinion-giving lawyer will agree. Disputes about this may then ensue.

54. GLAZER, OPINIONS, *supra* note 2, § 1.3.1, at 7 (“Receipt of a closing opinion from counsel for the other side is another way a party obtains information about its legal position that may bear on its decision to proceed with the transaction.”) (citations omitted). They emphasize, however, that the legal opinion “is only one of the building blocks in the opinion recipient’s due diligence. Closing opinions address only specific legal issues and by design do not cover many legal matters that might be of interest to recipients.” *Id.* § 1.3.1, at 8 (footnote omitted).

55. “[D]ue diligence connotes the absence of negligence in the preparation of disclosure; in turn, lack of due diligence is often considered negligence.” See Donald C. Langevoort, *The Statutory Basis for Due Diligence Under the Federal Securities Laws* 11 (PLI Corp. L. and Prac. Course Handbook Series No. B0-00A4, 1999) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1975)). The due diligence defense under section 11(b)(3) of the 1933 Act provides that an expert, including an attorney issuing a legal opinion in connection with a public offering, may limit liability for material misrepresentations or omissions by showing that the expert made a reasonable investigation into the facts, and after so doing, had reason to believe and did believe that statements made in his or her portion of the registration statement were true and complete at the time of effectiveness. *Id.* at 12.

56. Interview with Attorney W-2 (June 7, 2004), transcript at 3.

57. Interview with Attorney K-2 (May 17, 2004), transcript at 3.

authority, enforceability, and violations or conflicts noted in the introduction. In this case, I will frequently refer to the model developed by the TriBar Opinion Committee in their 1998 Report.<sup>58</sup> While this form may not be used by all lawyers, it nevertheless provides some baseline for discussing the contents of opinions.<sup>59</sup>

### *I. Due Authority*

The first opinion offered in the model closing opinion will be on “due authority.” This opinion goes to the agency questions that must underlie any transaction: Does the subject of the opinion (the “Company”) exist and have the power and authority to do that which the deal contemplates? The first substantive provision of the TriBar model, for example, would have the opinion-giver state that “the Company is a corporation validly existing under the law of [the state of incorporation].”<sup>60</sup> It is obvious why this should be true—if the Company does not exist, the parties will have legitimate concerns about its ability to engage in the transaction.<sup>61</sup> Thus, the TriBar 1998 Report observes that “[this] opinion serves as a cornerstone for many of the opinions that follow.”<sup>62</sup> It is a simple, uncontroversial opinion.<sup>63</sup>

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58. See *TriBar 1998 Report*, *supra* note 6, app. A-1, at 667. While I will refer principally to model opinions developed by the TriBar Committee, I am mindful of the fact that many lawyers view the TriBar Opinion Committee as having been dominated by mid-Atlantic (and in particular New York) lawyers, and that west coast (and in particular California) lawyers may approach opinion-writing in different ways. See, e.g., Interview with Attorney C-1 (May 13, 2004), transcript at 2-3 (discussing California-style of opinion practice); see also BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA, REPORT ON THE THIRD-PARTY LEGAL OPINION REPORT OF THE ABA SECTION OF BUSINESS LAW 5-8 (1992) (discussing distinctive California approach to certain aspects of enforceability opinions) [hereinafter *California 1992 Report*]. I also note, as discussed further below, that a significantly different approach to opinion-writing was proposed in 1991 by the Business Law Section of the American Bar Association in the *Accord*. See *Accord*, *supra* note 11. Although the *Accord* is viewed as having made an important contribution to the development of opinion practice, its specific recommendations have not generally been embraced. I discuss the development of the *Accord* in Part IV.A.2, *infra*.

59. This section and the next apply a clause-by-clause analysis of the major portions of the standard form closing opinion, something Gilson did with respect to a standard-form asset purchase agreement in *Value Creation*, and something which has been encouraged by others. See, e.g., Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 253 (1995).

60. *TriBar 1998 Report*, *supra* note 6, at 667.

61. Theoretically, of course, the corporation could exist *de facto* or by estoppel, and so enter into the subject transactions without having *de jure* existence. See *id.* at 641.

62. See *id.* There are other, more complex (and perhaps more difficult) opinions related to corporate existence that the recipient (e.g., the lender) could request. For example, the Company’s lawyer could be asked to opine that the Company was “duly incorporated” or “duly organized.” *Id.* at 641-42. How do these differ from the “valid existence” opinion? They would likely be viewed as referring to compliance with applicable corporate existence requirements in effect when the Company was formed, and/or at points leading up to the time the Company’s good standing certificate is obtained. This may be a much more complex and expensive determination to make. One lawyer tells a story about the pitfalls of this opinion:

The story I tell on this is the very first opinion I did in my career was about a little hat company that was borrowing some money, and I had to do the due authorization opinion—this is 1974 or ’75—so I ask the client for the articles and bylaws and the minutes and all that and

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The second substantive provision of the model due authority opinion builds on the existential conclusion of the first opinion, to assert that the Company has corporate (or other entity) power to execute, deliver, and perform under the operative agreements.<sup>64</sup> These provisions are generally self-explanatory. If the Company lacks authority to engage in the transaction, then it is axiomatic that any other promises that might be made in the operative documents (including those that might duplicate or overlap with legal opinions) are void.

Due authority opinions apparently have the deepest historical roots in third-party closing opinion practice. A number of lawyers interviewed said they believed that third-party closing-opinion practice began in the late nineteenth century, as an outgrowth of municipal finance transactions, where governmental authority to borrow was frequently in question. There appears to be some support for this surmise. Robert Gordon has suggested that lawyers' opinions were a response to protracted litigation over railroad bonds.<sup>65</sup> Even though "the U.S. Supreme Court virtually *always* disallowed defenses against the validity of bonds," he has observed, "investors [by the 1890s] did not wish to risk prolonged and expensive enforcement efforts, even if the law could help them force a favorable settlement."<sup>66</sup> Legal opinions—especially as to the authority of the municipality to incur the bonded indebtedness—were one response to the routine challenges to these bonds, which were often mounted by taxpayers (or elected officials) reluctant to make good on the obligations.<sup>67</sup> "When it became the standard practice of bond houses to obtain the opinion of a specially qualified attorney," Charles Fairman has noted, "municipal bonding

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they send them over, and I'm looking at the articles diligently like a brand new lawyer, and discover that when the company was formed in 1920, the articles provided that the company would have a life of fifty years. The company had in fact expired.

Interview with Attorney W-2, *supra* note 56, at 3.

63. The absence of controversy may stem in part from the fact that the corporate existence opinion will usually be based on certificates issued by the secretary of state (or other government official) of the state in which the Company was formed. See discussion *infra* Part III.B.1. As to these matters, the lawyer will be an informational pass-through.

64. "The Company (a) has the corporate power to execute, deliver, and perform the Credit Agreement and the Note, (b) has taken all corporate action necessary to authorize the execution, delivery, and performance of the Credit Agreement and the Note, and (c) has duly executed and delivered the Credit Agreement and the Note." *TriBar 1998 Report*, *supra* note 6, at 668.

65. Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 131 n.40 (Gerald L. Geison ed., 1983) (citing Charles Fairman, *Reconstruction and Reunion, 1864-88, Part One*, in 6 *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT IN THE UNITED STATES* 918-1116 (New York, 1971)).

66. See Gordon, *supra* note 65, at 131 n.40 (emphasis in original).

67. See *id.* at 79 ("One could not seriously think of marketing one's bonds among Boston investors without an opinion on their validity from respected Boston bond counsel."). Charles Fairman has observed that, during the period 1864 to 1888, "matters on municipal bonds bulked larger than any other category of the Court's business." Fairman, *supra* note 65, at 921 ("Probably no question in American jurisprudence has been more persistently and thoroughly litigated than the validity of municipal bonds in aid of railroads.") (quoting James A. Burhans, *The Law of Municipal Bonds*, at 2-3, 19-20 (S.A. Kean & Co., Bankers, Chicago & New York, 1889)).

underwent a profound change.”<sup>68</sup>

Of course, a lawyer’s opinion that her client has authority to engage in the transaction is no guarantee that that will be the case. In the infamous *Washington Public Power Supply System* (“WPPSS”) cases,<sup>69</sup> for example, some eighty-eight law firms were sued by the holders of \$2.25 billion in bonds issued by WPPSS.<sup>70</sup> The lawyers had issued opinions to their clients, who participated in the financing by entering into so-called “take-or-pay” contracts, which functioned essentially as a guarantee that WPPSS would sell a minimum amount of power to the participants, or would receive a minimum payment from them. The lawyers for the participants, who were for the most part municipalities, gave the standard opinions that each participant was authorized to enter into the agreement binding the participant to the project, and that the agreement “constituted a valid and binding agreement [of the participant] enforceable in accordance with its terms.”<sup>71</sup> Unfortunately for the opining lawyers, the Washington Supreme Court later concluded that many of these participants did not, in fact, have authority to provide what were, in essence, financial guarantees.<sup>72</sup>

Freed from their obligations under the take-or-pay contracts, the participants declined to do either, and the bonds went into default. The investors in these bonds sued the opining lawyers—unsuccessfully. A claim of aider and abettor secondary liability was alleged but given short shrift based on the absence of any allegations of “organization or relationship among the defendants permitting an expectation of concerted action.”<sup>73</sup> Common law fraud and negligent misrepresentation claims were also dismissed due in essence to a lack of privity.<sup>74</sup>

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68. Fairman, *supra* note 65, at 922. Fairman quoted at length a banker’s brochure from 1890 which might explain the early role of counsel generally in this process:

Many cases of repudiation of railroad-aid bonds (which . . . comprise by far the greater part of the defaults in the history of Municipal Bonds) have been brought about through the claim of illegality of issue. It is a matter of record that the proceedings bearing upon such issues were formerly loosely conducted, while purchasers were equally lax in giving the legal papers touching the same the attention and investigation which their importance demands, and which is invariably given them today . . . . Perfect equity between debtor and creditor demands . . . that the authority to issue shall be unquestionable, and bond-houses and other large fiduciary institutions of today meet this requirement by retaining attorneys of ability, who instead of taking for granted, as in former times, that everything had been “properly done, happened and performed,” now insist on all steps being taken in strict conformity with law.

*Id.* at 922-23 (quoting Eben H. Gay, *Municipal Bonds*, at 39-40, 45 (N.W. Harris & Co., Bankers, Boston 1890)).

69. Factual background concerning the WPPSS debacle is set forth in *Chemical Bank v. Washington Public Power Supply System*, 666 P.2d 329 (Wash. 1983), *on appeal after remand*, 691 P.2d 524 (Wash. 1984), *cert. denied*, 471 U.S. 1065, 1075 (1985).

70. *Mirotnick v. Sensney, Davis & McCormick*, 658 F. Supp. 932 (W.D. Wash. 1986).

71. *Id.* at 936.

72. *Chem. Bank*, 666 P.2d at 337-39.

73. *Mirotnick*, 658 F. Supp. at 941.

74. *Id.* at 943.



### Third-Party Closing Opinion Practice

A lesson one might draw from the *WPPSS* cases is that courts have a fairly high tolerance for errors in due authority opinions.<sup>75</sup> If so, one might infer that, to courts, the due authority opinion performs only a modest informational function—if the opinions really mattered, lawyers getting it wrong would be held liable. That, however, is not the way in which the lawyers interviewed for this project viewed them. Rather, lawyers overwhelmingly characterized this opinion as adding informational value. As one attorney explained:

I think that maybe the value of [the] legal opinion is that it forces the attorney to go through the process of verifying power and authority . . . . [I]f you weren't issuing a legal opinion, would you really sit down with the corporation's minute book and make sure the directors have been properly elected and the officers properly elected and authorized by the board? I don't know if you would do that, if you weren't issuing an opinion.<sup>76</sup>

It would seem that the due authority opinion frequently satisfies the value framework set forth above. In the case of a loan, it is critical to the reasonable expectations of the lender that the borrower has the authority to borrow (and repay) the loan, an essentially legal determination. As the same attorney noted, questions of authority are likely beyond the expertise of nonlawyer clients; they will not know whether they in fact have authority, and their representations alone cannot be dispositive.<sup>77</sup> Finally, the lawyer that typically gives the opinion will be Company counsel and will be the least-cost producer of this information. Even if Company counsel was not the regular outside counsel, he or she will have developed a familiarity with the borrower that recipient's counsel could not have developed.<sup>78</sup> As one attorney explained:

The theory, at least on the authorization . . . opinions, is that the seller or the borrower's counsel or someone like that is in the best position to make sure [that] the bylaws were reviewed and [that] the Board met, all those sorts of things. You can get a warranty from the company, but that's not worth anything if the company has financial problems. It just forces somebody to make sure that it's been done right and in an authorization . . . opinion, it's really not convenient for the other side to sort of dig into those sorts of things.<sup>79</sup>

In short, there is support for the claim that producing this information through the closing opinion process responds to reasonable expectations by efficiently reducing an important, legal information asymmetry.

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75. As discussed in Part III.C.1, *infra*, courts would appear to be less tolerant of errors in the due authority opinion when it is accompanied by evidence of greater wrongdoing (e.g., "bad faith") by the client.

76. Interview with Attorney D-1 (May 13, 2004), transcript at 3.

77. *Id.* ("When a party gives a representation and warranty that it has power and authority, they don't know what that means.").

78. See, e.g., Interview with Attorney C-2 (May 11, 2004), transcript at 5-6 ("We don't go through all the minute books and stuff like that [when representing lenders]. We just rely on the resolutions and the opinion . . . .").

79. Interview with Attorney W-2, *supra* note 56, transcript at 3.

## 2. No Violation/No Litigation

A second standard set of opinions will assure the recipient that certain factual representations of the Company are accurate (or, in a classic legal-double-negative, not inaccurate). Among other things, the lawyer may be asked to opine that the transaction will not violate or breach: (1) the Company's organizational documents (the "no-violation (organization) opinion");<sup>80</sup> (2) laws that apply to the transaction (the "no-violation (applicable laws) opinion");<sup>81</sup> or (3) other agreements or undertakings of the Company (the "no-violations (other obligations) opinion").<sup>82</sup> More controversially, the lawyer may also be asked to opine that the Company is not in violation of laws that generally apply to the Company (the "no-violation (other laws) opinion"),<sup>83</sup> and/or that it is not party to any pending or threatened litigation that would adversely affect the transaction or the Company itself (the "no litigation opinion").<sup>84</sup>

Using the framework set forth above, certain of these opinions would appear more likely to add value than others. The no-violation (other obligations) opinion would appear to be especially important, and not terribly controversial, as opinion recipients legitimately want to know that they are not unwittingly investing in a lawsuit.<sup>85</sup> Moreover, although the existence of contracts, lawsuits, etc., is factual (and could thus be disclosed by the parties), legal expertise is required to assess the terms and materiality of these undertakings or litigations. And, as with the authority opinion, Company counsel—not recipient's counsel—will be the least-cost producer of this information.

Unlike counsel for the lender, for example, Company counsel can review this information without exposing the Company to a claim that it has breached confidentiality. Unlike the Company itself (or, more accurately, its officers and

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80. See, e.g., GLAZER, OPINIONS, *supra* note 2, § 16.2, at 490.

81. *Id.* § 16.3, at 492.

82. *TriBar 1998 Report*, *supra* note 6, app. A-2, at 670. The *TriBar 1998 Report* indicates that the no-violations (other obligations) opinion should be given by in-house, rather than outside, counsel. This has a certain intuitive appeal, as in-house lawyers will (or should) know more about these matters than would outside counsel. See Committee on Legal Opinions, ABA Section of Business Law, *Closing Opinions of Inside Counsel*, 58 BUS. LAW. 1127 (2003) ("In appropriate circumstances, delivery of an opinion of inside counsel may reduce cost and avoid delay by eliminating the need for outside counsel to familiarize itself with matters already known to inside counsel or to duplicate work performed by inside counsel in the course of employment."). That said, if, as some lawyers indicate, the value of the opinion lies in the "independent" evaluation of the Company by an outsider, it is not clear how much one can rely on the opinion of in-house counsel.

83. GLAZER, OPINIONS, *supra* note 2, § 16.5, at 512-13.

84. *Id.* § 17.1, at 515.

85. See Interview with Attorney K-3 (June 1, 2004), transcript at 3 ("[A] no-violation [opinion] is the most important opinion that a recipient gets because it does save on the due diligence. It means that the recipient of that opinion does not have to worry about whether or not there is a breach of the other party to some other agreement that they may or may not be aware of.").

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employees), Company counsel will likely have legal expertise that gives it an advantage in reviewing and interpreting these contracts and other undertakings. Being “independent” of the Company in some important sense, the opining lawyer will also have a degree of objectivity in assessing the real potential for conflict presented by the agreement, litigation, etc.<sup>86</sup> And, in the event Company counsel determines that the proposed transaction will result in a violation, the lawyer is often in the best position to advise the Company about the steps that it should take to head the problem off, whether by disclosing the problem to the lender (with client permission, of course) or by modifying the other undertakings, and so forth. One lawyer summarized the value of the due authority and no-violations opinions as follows:

I mean, if the company is really not a company, that's not very good, because I don't know what it means if I have contracted with a company that doesn't really exist . . . . If there is litigation out there, I really would like to know. . . . I want to know if there are contracts, particularly material contracts, out there that are going to be violated. [R]epresentations and warranties don't necessarily get us to the I-really-want-to-know question. They do a good job of making sure that risk is allocated and how you're going to deal with indemnities, but they don't do quite such a good job of those things that you really, really think would be fundamentally a problem with respect to this [transaction].<sup>87</sup>

But the further one's opinion goes from the transaction at hand, the more problematic it would appear to be. Thus, lawyers noted that the cost-effectiveness of the no-violations (other laws) opinion depends on its scope. This variant on the no-violations opinion asks the lawyer for the Company to state that the Company is in compliance with all (or all important) laws affecting the Company. One lawyer observed that in its broad form, this opinion was unrealistic and not terribly valuable. This opinion asks the lawyer to say that the client:

has never violated any health law or something. Well, how are you going to give that? When you're talking about some manufacturer, some restaurant around the country, you [can't say] they've never been out of compliance . . . with any health code and have all permits, let's say food.<sup>88</sup>

Problems with no-violations opinions may stem at least in part from the factual nature of the opinion. Unlike the due authority opinion, which is often

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86. One in-house attorney suggested that in-house counsel may, under the right circumstances, be in the best position of all to provide a no-violations opinion about the “client” (i.e., the lawyer's employer). Although this is an opinion that “really requires you to be on your toes,” this attorney also observed that it “is actually one opinion that in-house counsel [is] better situated to give [because] I have to run around and make sure that I am still comfortable that the insurance is signed and lines up with what I know our material agreements are.” Interview with Attorney M-2 (Aug. 25, 2005), transcript at 7.

87. See Interview with Attorney S-1 (May 7, 2004), transcript at 4.

88. Interview with Attorney V-1 (May 25, 2005), transcript at 13. As noted above, the *ABA 2002 Guidelines* indicate that such an opinion would be inappropriate. *ABA 2002 Guidelines*, *supra* note 11, § 4.3, at 880 (“[A]n opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.”).

based on the attorney's first-hand knowledge of corporate governance actions leading to the transaction, the no-violations opinion might require the lawyer to investigate other transactions, other laws, or general states of affairs with which she has no direct experience. Moreover, there can be legitimate disagreement over the extent to which these opinions respond to the reasonable expectations of the parties. These opinions would appear to be frequent sources of friction between lawyers.

A special subcategory here is the no-litigation opinion, which in many respects is not a legal opinion at all.<sup>89</sup> Rather, as Glazer observes, "[w]hether or not a company has been sued or threatened with a lawsuit is a factual, not a legal, matter."<sup>90</sup> To the extent these opinions relate to the transaction itself, they would certainly appear to add value. For example, one attorney told the story of a transaction in which counsel to the borrower provided a "clean" no-litigation opinion (stating, in substance, that there was no litigation threatened or pending against the borrower).<sup>91</sup> At closing, borrower's counsel informed the attorney that there had been a written claim threatening to commence an action for injunctive relief that would seriously jeopardize the financing.

When lender's counsel stated that the threatened suit had to be noted in the opinion, counsel for the borrower objected. "'We really don't want to put that in the opinion,' the borrower's counsel said. '[W]e've told you about it, isn't that enough?' The lender's counsel said, '[W]ell . . . I know about it, [and] I've got to tell my client about it.'" But because this attorney's client was the agent for a number of lenders, and was also under an obligation to tell these lenders of the threatened suit, borrower's counsel had to "put it in the opinion." When asked if he thought this important piece of information would otherwise have come out in the course of diligence, this attorney simply said, "I don't know. I don't think so."<sup>92</sup>

As the no-litigation opinion broadens—to cover the Company's litigation status generally, for example—questions arise as to whether the opinion itself adds value, especially where the opining attorney has no particular reason to know much about the litigation.<sup>93</sup> Nevertheless, even if litigation has no relationship to the transaction at hand, courts are not especially tolerant of errors in these opinions, especially when the lawyer (or firm) that rendered the opinion knew (or had reason to know) of the litigation. In *National Bank of Canada v. Hale & Dorr*, for example, the Massachusetts Superior Court denied

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89. GLAZER, OPINIONS, *supra* note 2, § 17.1, at 516 (the no-litigation opinion "calls for little, if any, legal analysis").

90. *Id.* § 17.1, at 516-17.

91. Interview with Attorney C-1, *supra* note 58, at 14-15.

92. *Id.* at 15.

93. See GLAZER, OPINIONS, *supra* note 2, § 17.1, at 517 (General no-litigation opinions are "not appropriate when the opinion giver is only one of many firms retained by the company.").

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the defendant law firm's summary judgment motion on plaintiff's misrepresentation claim.<sup>94</sup> Here, the firm had issued an opinion stating, among other things, that there was no litigation against its client that "could have a material adverse effect on the business" of the client, except as specified on a schedule attached to the loan agreement entered into with the plaintiffs, a group of banks.<sup>95</sup> It turned out that potentially significant litigation against the borrower was not disclosed, but for unrelated reasons the borrower became insolvent.

Nevertheless, the banks sued the firm for "misrepresentation," a cause of action which required the banks to show "a false statement of a material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff."<sup>96</sup> The Massachusetts Superior Court denied the firm's motion for summary judgment because, among other reasons, the firm "represented to the Banks that 'it possesse[d] superior knowledge concerning the subject matter to which the misrepresentations relate[d]' and that it made its statements with certainty."<sup>97</sup> It is not surprising that this troubled the court, since the firm was also counsel to the borrower in that litigation.<sup>98</sup>

One way to test the informational value of closing opinions—and especially the no-violations/no-litigation opinions—is to determine whether their disclosures have altered or ended transactions. Most of the lawyers interviewed for this project indicated that they had seen transactions change or even fall apart due to information produced in the process of negotiation and opinion drafting, and this was especially true of the no-violations opinion. Yet, while flushing out material information appears to be an important function of the due authority and no-violations opinions, it is not always clear that the information will be considered (at least directly) by the recipient-client. "God forbid if one of my bank clients ever reads the damn opinion," one attorney explained.<sup>99</sup>

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94. See *Nat'l Bank of Canada v. Hale & Dorr*, No. 2000000296, 2004 WL 1049072, at \*4-7 (Mass. Super. Ct. Apr. 28, 2004).

95. *Id.* at \*2.

96. *Id.* at \*4 (quoting *Zimmerman v. Kent*, 31 Mass. App. Ct. 72, 77 (1991)).

97. *Id.* at \*10 (citing *Stolzoff v. Waste Sys. Int'l, Inc.*, 58 Mass. App. Ct. 747, 760 (2003)). An irony here is, as discussed above, that the firm had attempted to limit its liability by disclaiming or limiting the knowledge its opinion purported to represent.

98. A similar result obtained under similar circumstances in the unreported decision in *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. Ct. 2004), Memorandum and Order on Cross-Motions for Summary Judgment, Civ. Act. No. 01-2595 (BLS) (Mar. 8 2004), where deal counsel provided a no-litigation opinion even though it was also defending related entities in criminal investigations. See also ABA Section of Business Law Committee on Legal Opinions, *Legal Opinion Newsletter* 4, at 2-3 (June 2005) (reprinting and discussing *Dean Foods* decision).

99. Interview with Attorney C-1, *supra* note 58, at 8. Not all lawyers had this experience. One attorney indicated that she discusses closing opinions with her clients (who are often money-center banks) "on every deal because it is from the closing checklist." Interview with Attorney S-2 (July 26, 2005), transcript at 19. In one transaction in which a lawyer on the other side was being difficult in the opinion process, this attorney observed that she "was surprised at the extent to which all the business people on the deal understand that something unreasonable was being asked for in the opinion context." *Id.*

Nor is the Company (that is, the party that is the subject of the opinion) likely to learn much from the closing opinion process. Rather, opinion-giving lawyers say that their own clients (that is, the Company that is the subject of the opinion) often view the opinion process as a burden, a part of the “checklist” engineered by the lender (or other party in a position to demand the opinion as a closing condition).<sup>100</sup> “I do not think they give a good gosh darn about [closing opinions],” one former general counsel observed.<sup>101</sup> “All that mattered to [the CEO of her company] was that he wanted that new financing because we were getting a better rate.”<sup>102</sup> Another lawyer put it succinctly: “Clients have no patience with . . . discussions [about closing opinions].”<sup>103</sup>

This does not, of course, mean that the information has no relevance to the client. Rather, it would appear that clients—whether recipients or subjects—rely, wittingly or not, on their attorneys to know that the opinion has produced the appropriate information in the appropriate ways. Clients may not read the opinions, but they may well care that their lawyers do.<sup>104</sup>

Clients may care little about the content because one view of the closing opinion is that it is a mechanism to discipline or structure the lawyers, the parties, and indeed, the transaction itself. According to one New York lawyer who frequently represents lenders, “without a legal opinion, it would be easy for people not to focus on [the details of a transaction], not out of malice or

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100. See Interview with Attorney C-2, *supra* note 78, at 3.

101. Interview with Attorney W-4 (May 24, 2005), transcript at 8.

102. *Id.* (“I think . . . the way a lot of business people look upon it [is] you are such a pain in the ass.”). Another attorney put it more colorfully, indicating that in his experience clients do not “giv[e] a shit about opinions really. All they wanted to do is get the transaction done.” Interview with Attorney K-1 (June 10, 2005), transcript at 17.

103. Interview with Attorney G-1 (June 3, 2004), transcript at 26. As another attorney explained: [F]rom time to time, of course, [you] get into a dispute between the lawyers over what the opinion should say and shouldn’t say. And you can’t really appeal to the clients to resolve it, because they don’t care. As far as they’re concerned, that’s something for the lawyers to fuss about and if you tell your own client, you know, “There is a big problem in this opinion, it’s going to hold up the deal. . . [t]hey don’t say, “Okay, I’ll talk to the other side.” They just say, “Well, that’s unacceptable. You just have to resolve it so we can move on.”

Interview with Attorney K-1, *supra* note 102, transcript at 4-5.

The Report of the Washington State Bar Association aptly describes this phenomenon:

Even quite sophisticated clients often view opinions as so much legal boilerplate and have no sympathy for lawyers locked in dispute over arcane issues, particularly in the last hours before an important closing. And all too often, the client has a point: the lawyers have either created a problem by leaving resolution of an issue to the last minute, or have let ego, inflexibility or an “unbusinesslike” degree of concern over personal liability take the place of judgment and thoughtfulness.

*Washington State Report*, *supra* note 6, at 7.

104. It may also depend on who the client is. A lawyer who frequently represents large institutional lenders indicated that she discusses closing opinions with clients “on every deal because it is from the closing checklist, it is something they know about.” See Interview with Attorney S-2, *supra* note 99, at 19. “Even if they don’t actually read the full opinion or understand it,” she said, “I actually think in the lending markets a legal opinion is important . . . the lenders do want to see that the thought process has been undertaken and concluded.” *Id.* at 10.

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laziness, but just because there is so much going on.”<sup>105</sup> The closing opinion “imposes discipline,” she said, because it is evidence that “somebody ha[d] to think through the issues and check in their own mind and . . . go through the steps . . . .”<sup>106</sup> As another attorney (in-house counsel to a large public company) puts it, closing opinions help to assure that lawyers (and perhaps their clients) “do not outrun [their] headlights.”<sup>107</sup>

#### *B. Signaling Remote Parties (the “Market”)*

The disciplining explanation of closing opinions overlaps with another economically oriented theory, namely that the closing opinion is a signal to the market in general of the quality of the deal. Closing opinions, on this view, act as a sort of “good housekeeping seal of approval” not just for the parties to the transaction, but also for third parties who take a direct or indirect interest in the transaction.

Closing opinions have long interacted with broader markets in complex and subtle ways. As discussed above, there is a view that third-party closing opinion practice began with the advent of the municipal bond market in the latter half of the nineteenth century.<sup>108</sup> Certainly the securities laws enacted during the Depression—the 1933 and 1934 Acts, in particular—appear to have linked the requirement of an opinion to access to the public capital markets.<sup>109</sup> Often, when lawyers get into trouble for having given a closing opinion, it is because they are accused of a securities-related offense.<sup>110</sup>

Lawyers appear keenly aware of the market-signaling function of closing opinions. “[S]ince most loans are syndicated,” one attorney explained, the existence and scope of opinions will in part be “a question of what kind of

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105. *Id.* at 9. This lawyer told the following story in support of her view that closing opinions perform a disciplining function:

I actually worked on a deal recently where we were refinancing an old deal, and they had added collateral later in the deal and so there was an amendment to allow for that additional collateral. There was a list of items that needed to be satisfied before the amendment would become effective, and a borrower satisfied that test and took on additional collateral, but because one of the items did not include a legal opinion, no legal opinion was given, and nobody made sure that the borrower had perfected [an interest] in that additional property that it acquired. So, then all the banks thought that we were going to allow them to make this acquisition and that [the interest in] those assets acquired in connection to that acquisition would be perfected. . . . Everything was done that the lawyers felt had to be done, and then by that time the acquisition was consummated, nobody thought about the last point because there was probably a first or second year lawyer just checking the box . . . .

*Id.*

106. *Id.* at 9, 25.

107. Interview with Attorney M-2, *supra* note 86, at 5.

108. See discussion *supra* note 68.

109. As noted above, legal opinions are important in establishing certain defenses under the Securities Act of 1933. See discussion *supra* Part II.A.

110. See, e.g., SEC v. Nat’l Student Mktg. Corp., Civil Action No. 225-72 (D.D.C. filed Feb. 3, 1972). This case is discussed in greater detail beginning at note 124, *infra*.

expectation is in the marketplace.”<sup>111</sup> Another attorney explained as follows:

[T]he opinion is not only for the counter-party to a particular document, but for a third-party who may not even be a party to that agreement . . . . There are many types of project finance and securitization type transactions where a third-party is actually making a credit decision based on the assumption of enforceability of a contract that is a very crucial element of that financing, whether it's a project finance—you may have a power purchase contract where the obligor agrees to buy the power—the lender who is lending to the seller of the power is relying on that buyer's obligation to buy, yet it's not a party to that power purchase agreement. But it sure wants to be sure that . . . that power purchase contract is enforceable.<sup>112</sup>

In other words, some of the value of the opinion letter may derive not from its informational effects on the initial recipient, but rather on the more limited signal its mere existence may provide to later market participants. If third-party closing opinions perform this sort of signaling function, it would further support Gilson's theory about the reputational bonding that occurs when lawyers assist clients in business transactions. The verification benefits would inure not simply to the immediate parties to the transaction, but to those later in the chain who might succeed to the position of, for example, the initial lender. To the extent that access to wider markets has value, third-party closing opinions may add value by increasing this access.

The signaling view of closing opinion practice would find theoretical support in the observation that laws (and perhaps legal opinions, themselves) are “products,” commodities that, when properly sourced and used, promote efficient market exchange.<sup>113</sup> Professor Romano, for example, has argued that Delaware came to dominate the market for corporate charters because its default rules developed a centripetal force that made it cheaper and more valuable for lawyers—and not just clients—to use.<sup>114</sup> Delaware law became a “product,” Romano reasoned, because incorporating in Delaware gave clients (and lawyers) immediate access to “Delaware's well-developed case law, which provides a pool of handy precedents.”<sup>115</sup> One virtue of this body of precedent was, according to Romano, the ability to “obtain[] almost instantaneously a legal opinion on any issue of Delaware law.”<sup>116</sup> Professor

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111. Interview with Attorney B-1 (May 7, 2004), transcript at 4.

112. Interview with Attorney K-3, *supra* note 85, at 7-8.

113. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

114. *Id.* at 274-75. Chartering in Delaware became advantageous not only to clients, but also to lawyers, because the “reduc[ed] cost of specialization . . . decrease[s] the cost of furnishing legal advice to corporate clients.” *Id.* It is more efficient for lawyers to have their clients incorporate in Delaware because “when all their transactions can be governed by one state code,” they can “expand their services to include clients in several states without having to keep up with the intricacies of different codes and case law.” *Id.* at 275.

115. *Id.* at 274.

116. See *id.* This is likely correct with respect to corporate governance (i.e., due authority) opinions for corporations organized under Delaware law. There is consensus that competent business lawyers in any U.S. jurisdiction can provide such opinions. As noted in Part III.A, *infra*, however, there is growing



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Klausner has expanded this analysis, to observe that the market for contract terms—including those implicated by chartering in Delaware—presents a network effect.<sup>117</sup> This network effect—created in part by standardized forms of closing opinions—promotes increasingly efficient market signaling.<sup>118</sup>

The signaling explanation has its limits, however. First, there is the question of to whom the opinion is addressed, and whether others (not the addressees) may be permitted to rely on the opinion. The typical third-party closing opinion will be addressed to the party seeking the opinion (e.g., the lender in a loan) and their successors or permitted assignees.<sup>119</sup> Yet, lawyers are typically careful to circumscribe the universe of those who may “rely” on the opinion.<sup>120</sup> For example, lawyers would appear inclined to restrict reliance by non-addressees or by addressees outside the context of the given transaction.<sup>121</sup> In a similar vein, lawyers may be inclined to restrict the assignability of their opinions in general.<sup>122</sup> In theory, this means that only the addressee or permitted assignees can sue on the opinion if it is in error, an attempt to capture the privity defense that was historically available to lawyers sued for errors in their opinions.<sup>123</sup> Yet the limits on reliance or assignability do not, apparently, prevent the recipient from disclosing the existence of the opinion to later third parties. While the inability to sue on the opinion may affect its value, it would

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concern about the ability of non-Delaware lawyers to issue governance opinions as to unincorporated entities, such as limited liability companies, whose affairs may be governed by an operating agreement that involves issues of Delaware contract (or property or tort or agency) law. Non-Delaware lawyers may not be sufficiently familiar with these other aspects of Delaware law to provide an opinion on these matters. See *infra* Part III.A. To the extent that Delaware law is only valuable to (because practiced only by) Delaware lawyers, one may expect to see non-Delaware lawyers balk. See *TriBar Remedies Report*, *supra* note 6, at 1487 n.25.

117. See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 764-65 (1995).

118. See *id.* at 767 (“Because they have incentives to obtain the highest value for their firm’s shares, managers attempt to offer terms that maximize share values by minimizing agency costs and signaling to investors valuable information about the firm. Those terms might define shareholder voting rights, managers’ duties of care and loyalty, shareholders’ rights to dividends, or other aspects of the relationships among shareholders and managers.”).

119. See GLAZER, OPINIONS, *supra* note 2, § 2.3.1, at 40-41.

120. The TriBar form, for example, provides that “This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person without our prior consent.” *TriBar 1998 Report*, *supra* note 6, at 668.

121. GLAZER, OPINIONS, *supra* note 2, § 2.3.2, at 43-44.

122. In a recent survey conducted by the ABA Section of Business Law Committee on Legal Opinions, forty-seven of the forty-eight responding attorneys indicated that they include a limitation on the assignability of third-party closing opinions. See *Opinion Practices*, *supra* note 9.

123. See, e.g., *Savs. Bank v. Ward*, 100 U.S. 195 (1879); *United Bank of Kuwait v. Eventure Energy Enhanced Oil Recovery Assoc.*, 763 F. Supp. 729 (S.D.N.Y. 1990); *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 320 (N.Y. 1992) (reasoning that “before a party may recover in tort for pecuniary loss sustained as a result of another’s negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity”). The privity rules are discussed further below.

appear unlikely to negate its signaling function.

More troubling is the fact that closing opinions can sometimes send the wrong signals. In the infamous *National Student Marketing Corp.* case, for example, closing opinions were alleged to have aided and abetted securities fraud.<sup>124</sup> There, the prestigious firm of White & Case (among others) was sued by (among others) the Securities and Exchange Commission, for a variety of alleged transgressions in connection with its client's fraud.<sup>125</sup> Although errors in third-party closing opinions were only one part of the problem, the case nevertheless set off the first of many rounds of public deliberation about the nature and role of opinion practice.<sup>126</sup>

And then there is *Enron*. According to the Final Report of Neal Batson, the Court-Appointed Examiner of Enron, Vinson & Elkins (V&E), and Andrews & Kurth (A&K), Enron's principal outside firms, delivered dozens of closing opinions on the "true sale" of assets or the "true issuance" of securities in complex and questionable transactions.<sup>127</sup> According to the Examiner, in certain cases these opinions may have been inappropriate.<sup>128</sup> These firms issued these opinions despite the fact that they were "concerned about several terms in

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124. SEC v. Nat'l Student Mktg. Corp., Civil Action No. 225-72 (D.D.C., filed Feb. 3, 1972).

125. In *SEC v. National Student Marketing Corp.*, the SEC alleged that the directors and officers of National Student Marketing Corporation (NSMC) and their lawyers had violated the anti-fraud provisions of the federal securities laws by concealing the true financial condition of NSMC and its counterpart in a merger. 457 F. Supp. 682, 686-87 (D.D.C. 1978). The financial problems stemmed in part from sham transactions into which NSMC had entered several months earlier. See 402 F. Supp. 641 (D.D.C. 1975). The financial problems were discovered shortly before closing of the merger, which meant that the proxy statements used to solicit the target's shareholders' approval of the merger had been materially misleading. 457 F. Supp. at 689, 695. Because the lawyers (including White & Case) permitted the merger to go forward, without disclosing to the buyers the material changes in NSMC's financial statements, they were found to have aided and abetted violations of § 10(b) of the 1934 Securities Exchange Act and § 17(a) of the 1933 Securities Act. *Id.* at 712. Although not the sole basis of the claims, the White & Case attorneys allegedly contributed to the fraud by issuing opinion letters at the closing of the merger. *Id.* at 712-13. The firm settled prior to trial. The White & Case partner involved agreed to suspend his practice for 180 days. SEC v. Nat'l Student Mktg. Corp., Fed. Sec. L. Rep. (CCH) ¶ 96,027 (1977).

The White & Case opinion was apparently based in part on an opinion issued by counsel for the alleged purchaser in the sham transactions that preceded the merger. 402 F. Supp. at 645-46. These opinions claimed that certain money-losing assets of NSMC had been transferred to the purchasers prior to the end of NSMC's fiscal year. *Id.* at 645. The court in earlier proceedings held that the lawyer who issued these opinions "knowingly aided and abetted a violation of the federal securities laws" by issuing these opinions. See *id.* at 646. The case was later the subject of a novel. See ARTHUR R.G. SOLMSEN, *THE COMFORT LETTER* (1975); see also Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's The Comfort Letter*, 69 *FORDHAM L. REV.* 1111, 1128 (2000) (discussing the NSMC case and its novelization). Today, while lawyers may well have concerns about liability, cases such as *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), significantly limit lawyers' aiding and abetting liability under U.S. securities laws.

126. Within a year of the NSMC scandal, two major doctrinal articles on closing opinions appeared. See John P. Freeman, *Opinion Letters and Professionalism*, 1973 *DUKE L.J.* 371; James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order out of Some Chaos*, 28 *BUS. LAW.* 915 (1973) [hereinafter Fuld, *Chaos*]. As discussed in Part IV, *infra*, this scandal also spurred the bar associations to become involved in this practice.

127. *Enron Final Report*, *supra* note 15, at 50.

128. *Id.* at 49-50.

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these transactions that created questions about whether a sale had occurred.”<sup>129</sup> Based on these concerns, the Examiner concluded that a fact-finder could determine that the law firms committed malpractice under Texas law, and aided and abetted breaches of fiduciary duties by Enron officers.<sup>130</sup>

Strictly speaking, these were often not “third-party” closing opinions. Rather, they were addressed to Enron itself or affiliates engaged in these transactions. To this extent, one might then argue that no erroneous signaling could have occurred, even if the opinions were improper. Not being issued to third parties, no one other than Enron could have or should have relied on the opinions, and so no misleading signal could have been sent, at least by the opinions themselves. But this would ignore the larger context in which these opinions were given. According to the Examiner, even if “third parties” did not rely on these opinions, it would appear that Enron’s accountants (Arthur Andersen) did when certifying erroneous financial information.<sup>131</sup> Without these opinions, Andersen may not have been able to accord the subject transactions the accounting treatment Enron wanted—accounting treatment that, in the final analysis, may have misled investors.<sup>132</sup>

It would appear that, whatever else may be true of Enron, closing opinions issued in certain of its transactions failed to perform their informational functions. They may have formed links in informational chains. But, at a minimum, the inferences drawn from this information appear to have been wrong.

Whether Enron’s lawyers should be culpable for these errors has not yet been determined.<sup>133</sup> The problem, as one lawyer noted, may be that “Enron was represented by firms like Vinson & Elkins and Andrews & Kurth, which are

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129. *Id.* at 50.

130. *Id.* at 48-49.

131. Compare *Enron Final Report*, *supra* note 15, at 48 (V&E’s work “included rendering legal opinions . . . [which] were required by [auditor Arthur] Andersen to allow Enron to obtain the accounting treatment that it sought for these transactions.”), with Schwarcz, *supra* note 5, at 30 (Enron’s “information failure . . . is not the result of inaccurate information provided by the lawyers”). See also Nathan Koppel, *Wearing Blinders*, 26 AM. LAW. 75, 164 (July 2004) (discussing informational effects of V&E opinions); Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1242-43 (2003) (discussing use of structured finance opinions).

132. In fact, according to the Examiner’s Report, V&E engaged in a considerable amount of hand wringing about whether it could or should issue many of these opinions. “Vinson & Elkins attorneys testified that they repeatedly told both Enron and Andersen, that Andersen had asked for the wrong opinion when it requested a true issuance opinion. This was potentially significant because Vinson & Elkins did not believe that it could provide a true sale opinion in some of those transactions as structured.” *Enron Final Report*, *supra* note 15, at 31. For interesting speculation on what Enron’s lawyers might have thought and done in the face of pressure to give these opinions, see Milton C. Regan, *Teaching Enron*, 74 FORDHAM L. REV. 1139 (2005).

133. Professor Schwarcz would appear to blame investors for drawing these erroneous conclusions, not those who produced the information. See Schwarcz, *supra* note 5, at 7 n.33 (“I argue . . . that these [information] failures are primarily the fault of investors, and at most they are exacerbated by the dual-information problem—that legal-opinion information is accurately provided for one purpose, bankruptcy, but then used out of context for another purpose, accounting.”).

very highly regarded firms, but [that] didn't make Enron honest . . . [T]he fact that you have a reputable lawyer representing the client is no evidence of the client's honesty."<sup>134</sup> Thus, there are limits to the extent to which a lawyer can, through opinion practice, act as an effective reputational intermediary. The market signal of an opinion—indeed, the signal generally sent by the presence of prestigious counsel—can be misused.

Over-reliance on the verification function of business lawyering, especially as indicated by closing opinions, has been the basis of some criticism of Gilson's model. In one of the few empirical studies that has touched on closing opinion practice, sociologists Mark Suchman and Mia Cahill, who studied lawyers in Silicon Valley, have argued, *contra* Gilson, that closing opinions have little informational value.<sup>135</sup> In their view, opinion letters "merely restate the client's pre-negotiated representations and warranties."<sup>136</sup> Because closing opinions (at least in Silicon Valley transactions) are "informationally superfluous," Suchman and Cahill argue that opinion letters exist to help the parties manage the uncertainty inherent in the high-risk world of venture investing.<sup>137</sup> They come to this conclusion based on the assumption that "a law firm is legally responsible for the veracity of its opinion letters."<sup>138</sup> Lawyers thus issue opinions, according to Suchman and Cahill, not because opinions produce or verify information, but because lawyers are, in certain contexts, co-venturers with their entrepreneurial clients.

It is not clear how broadly one can construe this criticism. First, as observed above, even the most basic opinion letters do go beyond a client's representations. If, for example, the opinion letter states that the Company has authority to engage in the transaction, it is conveying something different than that same statement appearing solely in the operative documents. Coming from the lawyer, it has an authority (so to speak) that it would lack in the underlying contracts. One person's repetition is another person's verification.

Second, even if their observations were accurate, they applied to a limited context—that of high-tech, venture-capital-financed investing. As one attorney explained, "in the wild venture capital days . . . a lot of . . . people hired big law

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134. Interview with Attorney B-1, *supra* note 111, at 4. Although a conclusion about the role that closing-opinions played in Enron will have to wait for another day, they may provide one part of the answer to Professor Langevoort's question about Enron: "How was the market for such a widely followed stock so easily fooled, especially when (in hindsight, at least) warning signs about obscure accounting, risk-shifting, and self-dealing practices were visible?" Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002).

135. Suchman & Cahill, *supra* note 5, at 694-95.

136. *Id.* at 695.

137. *Id.*

138. *Id.* ("[E]ven a simple reiteration of the client's representations would place the law firm's resources on the line as a kind of insurance against deception.").

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firms for the credibility that the law firm brought to the table.”<sup>139</sup> Given the volatile nature of venture investing, “[t]he problem for the lawyers was these people could be gone tomorrow. But your opinion would still be here.”<sup>140</sup> In other words, the function that Suchman and Cahill identify may be less plausible in less volatile areas of practice (e.g., lending, asset sales, etc.).

Third, even if the words within the four corners of the opinion letter are not news to the recipient—and in certain respects they could not be (if only because, as some lawyers observe, the recipient may not read it)—the process of producing the opinion also generates information that is important to the transaction, which may not otherwise be forthcoming, and upon which the recipient and the “market” may rely. Among other things, the opinion process may cause a lawyer with concerns to decline to offer a standard opinion. The most important opinion information may, therefore, come not from the opinion itself, but from the lacunae—the omitted standard term, which signals that there may be some problem precluding the opinion. This would lead the recipient to seek more information, which, as discussed above, might result in changes to (or termination of) the transaction. In short, opinion writing would appear to be about more than co-venturing with clients. Closing opinions are also independent assertions about the legal and factual context in which the transaction is being conducted.

### III. PRICE PROBLEMS

While certain features of closing opinions may produce and verify valuable information under certain circumstances, the practice is not an unalloyed model of market efficiency. Closing opinions are not cheap under the best of circumstances. Several lawyers indicated that as a general matter, a third-party legal opinion would add at least \$5,000 to the transaction and, depending on the type of transaction, substantially more.<sup>141</sup> This is not necessarily a cost clients are happy to pay. As one lawyer explained, “[o]pinion practice is a fairly academic part of the practice[,] and clients view it as a transaction cost—something that they never want to have to hire a lawyer for, in my experience.”<sup>142</sup>

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139. Interview with Attorney M-2, *supra* note 86, at 18.

140. *Id.*

141. See, e.g., Interview with Attorney W-2, *supra* note 56, at 14 (“[Y]ou can’t get an opinion out the door, even the simplest authorization opinion, for under \$5,000 . . .”).

142. Interview with Attorney L-1 (May 6, 2004), transcript at 4. Of course, this may flow from business clients’ general disdain for the formalities of business law practice. See Interview with Attorney G-2 (May 10, 2004), transcript at 3 (“[A] lot of business people think that all of the corporate formalities are just foolishness and a waste of time.”). Nevertheless, attorneys often cite stories about needless expense and delay caused by opinion-writing. “[I]n one case,” a lawyer said,

I was representing the borrower on a transaction and in this case, [a] Boston instead of New York lender, insisted on land use opinions for half a dozen projects—they were buying a manufacturing facility . . . that had a number of locations in very small towns, and I fought

Lawyers interviewed for this project indicated three recurrent types of economic problems with closing opinion practice. First, there is the enforceability opinion, which lawyers frequently claim costs more than it is worth. Second, there are procedural and substantive limitations on opinion practice which call into question the informational value of the typical closing opinion. Third, and perhaps most controversially, there is the problem of lawyer liability, the externalization of the risk of deal failure onto lawyers.

#### *A. Enforceability Opinions*

Unlike the due authority and no-violations opinions discussed above, lawyers indicate that the enforceability opinion—the “dumbest of all . . . opinions,” according to one lawyer<sup>143</sup>—may systematically fail to reduce information asymmetries in a cost-effective way.

It sounds innocuous enough. The TriBar model provides that the lawyer will say that the operative documents are “valid and binding obligations of the Company enforceable against the Company in accordance with their terms.”<sup>144</sup> Sometimes called the “remedies” opinion, this opinion “addresses the enforceability of each of the undertakings of [the Company],” including the affirmative and negative covenants in the operative documents, as well as the remedies specified therein.<sup>145</sup>

At least as articulated by the practitioner’s literature, the principal problem with the remedies opinion is economic in nature. A recent report of the Business Law Section of the California Bar Association, for example, observes that “[o]ften, lawyers and their clients request a remedies opinion from counsel for another party in the transaction without engaging in the recommended cost/benefit analysis.”<sup>146</sup> While the literature is not terribly clear on what should factor into this calculation, the fact that “the market” demands the enforceability opinion is not, of itself, said to be sufficient.<sup>147</sup>

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tooth and nail with the Boston firm saying this is a huge waste of money—it’s a very difficult opinion to give that you’re not going to get any benefit from but it’s going to cost my client a lot of time and money. We lost that, and the client said, “Go ahead and do it.” But as the example I gave, I said, “This isn’t like the Empire State Building or the Hancock Tower . . . You’re in towns where these mills have been . . . for 120 years, and in one case, they do have a zoning ordinance, and nobody can find a copy of it, so the value of the legal opinion is kind of the tail wagging the dog here.”

*Id.* at 6.

143. Interview with Attorney G-1, *supra* note 103, at 5, 20. Another attorney observed that the enforceability opinion “clearly was not something that people had carefully thought through.” *See* Interview with Attorney R-1 (May 12, 2004), transcript at 3. Even though “the wisdom of it is occasionally challenged, most people end up” giving the opinion because “at least in the U.S., you cannot swim upstream.” *Id.*

144. *TriBar 1998 Report*, *supra* note 6, § 3.1.

145. *TriBar Remedies Report*, *supra* note 6, at 1484.

146. *California 2004 Report*, *supra* note 1, app. 4, at 1 (footnote omitted).

147. *See id.*; *see also* *ABA 2002 Guidelines*, *supra* note 11, ¶ 1.6 (“An assertion that a specific

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Lawyers suggest that the enforceability opinion may cost more than it is worth for either or both of two reasons. First, upon reflection, it is not entirely clear what the opinion means. Does it mean that the opining lawyer believes that “each and every” provision of the operative agreements would be enforceable? Or only that certain “essential” provisions would be?<sup>148</sup> If the former, how seriously should we take the opinion? Is the lawyer opining on the accuracy of the client’s factual representations and warranties? If the latter, what is considered “essential,” and who decides? Lawyers observed that significant disputes arise over what the enforceability opinion means, and how broadly it should be construed.<sup>149</sup> “Many of our fights,” one attorney observed, “are over the issue of enforceability, and it’s kind of silly.”<sup>150</sup> These fights likely increase costs, but may not correspondingly improve the information in the deal.

Second, even greater efficiency problems crop up because of the division of labor. As with the other closing opinions, the enforceability opinion is often written by the lawyer (for example, for the borrower) who did not draft the underlying documents. While this lawyer may be in the best position to offer the authority and no-violations opinion—where she is offering information about her client—the enforceability opinion asks the lawyer to opine on something with which she may have comparatively little familiarity—documents written by opposing counsel.<sup>151</sup> As one lawyer who typically represented lenders explained:

When it comes to enforceability, in most cases, you [e.g., the bank’s lawyer] drafted the document, so you’re asking me to tell you that a document which probably you have drafted, used in various variations a hundred times in the past, you’re asking

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opinion is ‘market’—i.e., that lawyers are rendering it in other transactions—does not make it appropriate to request or render such an opinion if it is inconsistent with these Guidelines.”).

148. Compare *TriBar 1998 Report*, *supra* note 6, § 3.3.4, nn. 75, 77 & 78, § 3.5.1, with *Accord*, *supra* note 11, § 10(a), and *California 1992 Report*, *supra* note 58, at 5-8.

149. See, e.g., Interview with Attorney S-2, *supra* note 99, at 19-20. As discussed in note 116, *supra*, a current—and perhaps expanding—subcategory of remedies opinion disputes involves the extent to which non-Delaware lawyers can give enforceability opinions on transactions governed by Delaware law. There appears to be little quibble with the proposition that any competent business lawyer is qualified to give standard corporate governance (due authority) opinions for a Delaware corporation. This is presumably because Delaware corporate law is sufficiently well-known that admission to that state’s bar is not needed to develop the requisite level of expertise. It is, however, considerably less clear whether a lawyer not admitted to practice in Delaware would also be competent to opine on contracts themselves governed by Delaware law. Controversies apparently arise, for example, when a non-Delaware lawyer is asked to opine on the enforceability of an operating agreement that governs a Delaware limited liability company. An operating agreement may be a contract more complex, nuanced and subject to localized interpretation than the comparatively standardized Delaware corporation charter and bylaws. See *id.* (discussing disputes of this type).

150. Interview with Attorney S-1, *supra* note 87, at 15.

151. The enforceability opinion is “the toughest opinion to give and often the toughest one that I’ve ever thought to justify . . . because in essence what you’re asking is for the lawyer for the borrower or the lawyer for the seller or whatever to say that the document prepared by the lender’s lawyer is or isn’t enforceable.” *Id.* at 5.

me to tell you that it works. I've never understood the justification for that.<sup>152</sup>

Another attorney expressed the same point in dollars and cents: "[L]ook, you're paying your [recipient's] lawyers [to draft the documents], . . . why do you need [Company counsel] to tell you they are enforceable?"<sup>153</sup> Nor was this view confined to lawyers who represented borrowers. "[I]f I'm representing the lender," one lawyer with a lending practice observed, "I've drafted the damn documents—they're my documents. I've used them over and over again. I do know, or should know, whether or not they work."<sup>154</sup>

It is obvious that the lawyer for the borrower would not usually be in an especially good position to provide an opinion on the enforceability of the loan agreement. The same will be true whenever a lawyer is asked to opine on the enforceability of a document she did not draft. Nevertheless, U.S. practice often requires this seemingly inefficient division of labor. Interestingly, it appears that this division of labor has not always been standard in U.S. practice.<sup>155</sup> Several lawyers who began practice in the 1940s and 1950s indicated that lawyers for both the borrower and the lender would provide an opinion to the lender at closing.<sup>156</sup> Indeed, according to one lawyer, one prominent U.S. bank made it a condition to closing that it receive an opinion on the Company's authority and the enforceability of the transaction, not from the Company's counsel, but from its own counsel.<sup>157</sup> This practice may persist with respect to at least one "aberrant" U.S. bank.<sup>158</sup> Another lawyer suggested that in the past, the enforceability opinion was given by counsel to both the Company and the lender.<sup>159</sup>

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152. See Interview with Attorney H-1 (May 1, 2004), transcript at 6. He had greater enthusiasm for the due authority opinion:

I, as the lawyer for the borrower, am in a much better position to know, or at least to find out, if I hadn't otherwise represented the company, whether the company was duly organized; whether the resolutions are right. I have much better access to that than you do as the lender. So I don't think it's inappropriate to ask me to give you an opinion about those things that relate to my client.

*Id.*

153. Interview with Attorney V-1, *supra* note 88, at 10.

154. Interview with Attorney C-1, *supra* note 58, at 8.

155. It is also interesting to note that opinion-giving duties are divided differently in England. See Geoffrey Yeowart, *Principles for Giving Opinion Letters on English Law in Financing Transactions*, BUTTERWORTH'S J. INT'L BANKING & FIN. L. 164, 167 (May 2003); see also Interview with Attorney B-1, *supra* note 111, at 1 ("[M]y understanding is that the pattern in the London market or the custom in the London market is the reverse. That is, in the London market my understanding is that the norm is that Lender's counsel gives the opinion and not borrower's counsel."); Interview with Attorney R-1, *supra* note 143, at 7 ("U.K. practice generally has been that the lender's counsel does give the opinion.").

156. See, e.g., Interview with Attorney H-1, *supra* note 152, at 3.

157. Interview with Attorney E-1 (Sept. 15, 2004), transcript at 6.

158. One prominent lending lawyer noted that he knew of at least one large bank that "actually requires its counsel to give an enforceability opinion, as well as borrower's counsel opinion." Interview with Attorney B-1, *supra* note 111, at 1. He acknowledged, however, that "that is an aberration." *Id.*

159. "[A]t one time, both lawyers, both sides gave the opinion . . . It has withered away . . . I'm speculating, in part because [the lenders' lawyers] decided 'why would we take the risk, why should we



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Lawyers sometimes justify the dynamics of the giving of the enforceability opinion on the grounds that the lender's lawyer (usually New York counsel) wants to make sure that the loan and other agreements would be enforceable as if the local law of the borrower (rather than the chosen law) applied.<sup>160</sup> Because the Company's counsel is (or is thought to be) familiar with the local law applicable to the Company, the Company's counsel is said to be in the best position to provide the enforceability opinion as if their own state's law applied.<sup>161</sup>

There are, however, at least two problems with this explanation. First, there is no particular reason to assume that Company counsel's familiarity with local law will exceed, in value, bank counsel's familiarity with its own form. Indeed, there is a good chance that the repeat-playing bank lawyer has already dealt with the choice-of-law question in that jurisdiction.<sup>162</sup> Second, and more importantly, it is likely that the choice of New York law will be upheld, especially if (as is usually the case) at least one party (e.g., the bank) has some connection to New York.<sup>163</sup> In other words, it is not clear that there is much value in anticipating what a court, acting under the borrower's law, would do

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give it when we're not getting paid for it?" Interview with Attorney G-1, *supra* note 103, at 8.

160. Interview with Attorney B-1, *supra* note 111, at 3 ("[W]hat I have done on occasion is gotten the borrower's counsel to give an opinion that would say something like, let's say the company's in Kansas, to say that if an action was brought on the agreement in the courts of Kansas, the courts of Kansas would respect the New York governing law provision and provided, however, that if the courts of Kansas, notwithstanding the New York governing law provision chose to apply Kansas law, the agreement would be legal, valid, binding and enforceable.").

161. "[Y]ou want to know that in Maine, to have a deal [be] effective, you have to use blue paper or wide margins or have it signed with two witnesses or any of these kind of odd state law requirements." Interview with Attorney G-2, *supra* note 142, at 3; *see also* GLAZER, OPINIONS, *supra* note 2, § 9.12.3, at 284 (recipients may seek "an opinion that the agreement would be enforceable . . . if [the Company's] state's law were to be applied instead of the law chosen by the parties.").

A lawyer for a number of New York banks has observed that lawyers in North Carolina—home of, among others, Bank of America—have recently become expert on New York law, or at least sufficiently expert to review and accept opinions on New York law, even though their practice is concentrated in North Carolina. "One of the things that has developed is that Charlotte, North Carolina has become a major banking center because two of the major banks in America have headquarters there, but the marketplace expects agreements to be governed by New York law and so the lawyers in North Carolina kind of have to practice New York law." This attorney observes that these lawyers are typically licensed to practice in both New York and North Carolina. Interview with Attorney D-1, *supra* note 76, at 3.

162. "The notion that [Name Omitted] in New York who does bond financing over and over and over again gives me a 150 page bond document and I'm going to tell them whether it is or isn't enforceable—it's kind of silly to be honest with you—I don't see it. Ask your own counsel." Interview with Attorney S-1, *supra* note 87, at 15.

163. EUGENE F. SCHOLES ET AL., CONFLICT OF LAWS § 18.6, at 872 (3d ed. 2000) (permitting parties to choose New York law "afford[s] parties the opportunity to select a sophisticated body of commercial law and a judicial system with substantial experience . . ."). One lawyer had the following observation about the choice-of-law rationale:

I think [the choice-of-law rationale] is even more of a stupid duel where you've got the credit agreements drafted by New York counsel imposing the choice of law on somebody in Pennsylvania or wherever and then trying to insist that they give blessing that there is nothing that they would challenge in that state. There is a logic to it [but] it's a very annoying process.

Interview with Attorney T-1 (June 6, 2004), transcript at 17.

because courts would not disregard the chosen law.

A more common justification for the enforceability opinion is that it results in a check on the drafter's work, a "second set of eyes" reviewing the documents.<sup>164</sup> But this explanation also presents problems. The inference is that in the absence of an opinion, the borrower's counsel would not review the documents to determine enforceability. But that seems unlikely given the general level of professionalism required of all lawyers.<sup>165</sup> Moreover, this explanation assumes that the borrower's counsel would have sufficient expertise and independence to review the documents in a way that would in fact be helpful to the recipient. This does not appear terribly realistic, given the overarching duty that the borrower's counsel has to her client.

Nor do courts appear inclined to impose liability for errors in an enforceability opinion where the mistake can fairly be traced to the recipient's counsel. In the *Prudential Insurance* case,<sup>166</sup> for example, the Prudential Insurance Company agreed to restructure \$92 million in ship mortgages issued by United States Lines ("USL"). Unfortunately, a typographical error made by counsel to one of the lenders caused the mortgage to be recorded in the stated amount of around \$92,000, not \$92 million.<sup>167</sup> After USL went into bankruptcy, the error was discovered and USL's bankruptcy trustee challenged the mortgage under the "strong-arm" clause of the Bankruptcy Code.<sup>168</sup> Although Prudential settled the matter with USL's bankruptcy trustee, it did so at a loss of more than \$11 million.<sup>169</sup>

Prudential sued both its counsel (Dewey Ballantine) and counsel to USL, Gilmartin, Poster & Shafto, which had provided a third-party closing opinion to

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164. Interview with Attorney K-2, *supra* note 57, at 3.

165. This is, as discussed below, often characterized as a form of "professional pride." See discussion *infra* Part IV.B.

166. See *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 319 (N.Y. 1992), *aff'g* 573 N.Y.S.2d 981 (App. Div. 1991).

167. The error was apparently caused by the firm of Haight, Gardner, Poor & Havens (Haight), counsel to one of the lenders (General Electric Capital Corporation (GECC)) and "special admiralty counsel" to Prudential. 573 N.Y.S.2d at 983. According to affidavits submitted in the lower court, Haight's staff prepared the document containing the approximately \$92 million error. *Id.* at 984 (Haight "admits that the 'typographical error [occurred] on a word processor in [Haight's] office.'" (citation omitted)). Ironically, after it was determined that the Prudential mortgage was improperly recorded (due to GECC's counsel's error), GECC—in a display of breathtaking gall—moved for a partial summary judgment declaring the mortgage to be invalid for anything over the stated amount of \$92,885.00 (presumably to obtain a step up in priority). Needless to say, GECC was not successful. See *Prudential Ins. Co. v. Am. Lancer, S.S.*, 686 F. Supp. 469 (S.D.N.Y. 1988), *aff'd*, 870 F.2d 867 (2d Cir. 1989).

168. 573 N.Y.S.2d at 984 ("While we find it clear from the record that [the parties] knew that the correct amount of Prudential's mortgage . . . was \$92,885,000 rather than \$92,885, under the peculiarities of the bankruptcy and maritime law those parties could challenge the amount of that mortgage, even though they had actual knowledge of the facts.").

169. Prudential gave up 17.5% of the net proceeds (\$11,400,000) from a foreclosure sale of five of the ships to USL's bankruptcy trustee. Prudential also sought attorneys' fees from its defense of the mortgages and other damages. 605 N.E.2d at 319.

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Prudential.<sup>170</sup> After concluding that Gilmartin had a sufficient relationship with Prudential to warrant imposition of a duty,<sup>171</sup> the court then considered whether the firm breached it. The New York Court of Appeals concluded that—despite the error—it did not:

[T]he purpose of an opinion letter, as correctly spelled out by defendant, is to offer assurances to the creditor about the inner workings of the borrower's business. . . . An examination of the opinion letter reveals that, although it did not make the specific assurance of a dollar amount of security, it did fulfill its purpose of assuring procedural regularity in forming the opinion. . . . [T]he letter simply stated that those documents represented "legal, valid and binding" obligations of U.S. Lines, which, once recorded, would be enforceable against it "in accordance with [their] respective terms," whatever those terms might be. No specific dollar amount was assured.<sup>172</sup>

The result in *Prudential* is normatively appealing to opinion-giving lawyers, but this passage suggests the court did not fully understand the nature of the opinion that was given. Closing opinions about the "inner workings" of a borrower's business will be the due authority and perhaps the no-violations opinions discussed above, about which lawyers seem comparatively sanguine. However, the opinion in issue here—that the contacts were "legal, valid and binding"—went not solely to the status of the borrower, but also to the agreements into which it entered. While it is undoubtedly true that the opinion did not "assure" a "specific dollar amount," it would appear equally true that the opinion failed to perform the informational function an economic analysis would suggest. It may be that in a narrow sense the opinion was "correct"—the mortgage was "enforceable" (albeit not in the amount the parties expected). But this seems somewhat formalistic. A more plausible explanation may be solicitude for lawyers placed in the unenviable position of having to provide an enforceability opinion on defective documents that they did not prepare.<sup>173</sup>

Lawyers suggest that, at least outside of the financing context, there is increasing willingness to waive the enforceability opinion. Several lawyers observed that parties with roughly equal bargaining power in an asset sale may dispense with the enforceability opinion. As one lawyer explained:

[I]f both sides are asked to give essentially the same opinion regarding [enforceability], . . . there is a view that, well, each one of us can do the due diligence and not necessarily rely on those client's representations and warranties in the agreement and therefore neither of us will give the opinion because it would

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170. The opinion letter apparently included standard enforceability language, for example, an assurance that the mortgage documents represented "legal, valid and binding" obligations of USL. "Moreover, according to Gilmartin's [opinion] letter, neither Federal nor State law would interfere 'with the practical realization of the benefits of the security intended to be provided' by those documents." *Id.*

171. *Id.* at 322 ("[T]he bond between Gilmartin and Prudential was sufficiently close to establish a duty of care running from the former to the latter.").

172. *Id.* at 322-23 (emphasis supplied).

173. The Gilmartin firm, itself, appears to have weathered the storm. See Gilmartin, Poster & Shafto LLP, <http://www.gpslaw.com/attorneys.jsp> (last visited Sept. 15, 2005).

typically be mutual.<sup>174</sup>

Another lawyer observed a similar phenomenon in the securities context, noting that:

[T]he underwriters used to include in their laundry list of everything they wanted an enforceability opinion. And I believe that over the years they finally realized that that was a really stupid thing to ask for because it caused people like me to have to take a bunch of exceptions and basically provide a road map for what might not be enforceable in the agreement. These days, I don't think they ask for an enforceability opinion, which makes sense because after all, the underwriting agreement is drafted by the [underwriter].<sup>175</sup>

But enforceability opinions apparently remain important in novel or more complex transactions. In securitizations and structured financings, for example, lawyers are frequently asked to offer a variant of the enforceability opinion, and state that the property transferred in the transaction will not become part of the bankruptcy estate of the Company should the Company declare bankruptcy. Although these "true sale" opinions are somewhat specialized, they are also controversial because, among other reasons, lawyers suggest that they add little informational value to the transaction. For example, one Boston lawyer had the following observations about the true sale opinion frequently sought in these transactions:

[T]he true sale opinions strike me as a sort of magnificent example of the silliness of opinions. Because what you've got is . . . a completely academic exercise. You lay out the law in the discussion— . . . and then you lay out the facts and the facts actually say pretty much the same thing in every opinion, with little wrinkles of course. And then you say, "Oh, there's this thus and such factor which actually might cut the other way" and that's just to show that you're actually thinking about it. And then you get to the end and you say, "Well, of course we can't absolutely say it for sure, but our best judgment is such and such is going to happen." And everybody says, "Great," and they stick it in a drawer. And it's absolutely meaningless. I mean, if you really look at it carefully, it says nothing.<sup>176</sup>

A full discussion of the peculiar virtues and vices of true sale (and related) opinions is beyond the scope of this paper. Professor Schwarcz, a specialist in true sale opinions from his many years in practice, has offered an aggressive

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174. Interview with Attorney K-3, *supra* note 85, at 2; *see also* discussion at note 141, *supra*, on the relationship between the dollar value of transactions and the opinion requirement.

175. Interview with Attorney W-4, *supra* note 101, at 3; *see also* GLAZER, OPINIONS, *supra* note 2, § 9.14.2, at 311 ("[T]he trend has been toward limiting the opinion on the underwriting agreement to an opinion that the agreement has been duly authorized, executed and delivered.").

176. Interview with Attorney K-1, *supra* note 102, at 12. Historically, these opinions were required in these types of transactions by bond rating agencies, such as Moody's and S&P. *See, e.g.,* Standard & Poor's, *CMBS Legal and Structured Finance Criteria* 99-101 (May 1, 2003). Apparently, rating agencies are placing less emphasis on these opinions. *See* William H. Widen, *Lord of the Liens: Towards Greater Efficiency in Secured Syndicated Lending*, 25 CARDOZO L. REV. 1577, 1577 n.3, 1577-78 (2004) (citing Dina Moskowitz, *Revised Article 9 of the Uniform Commercial Code: New Standard & Poor's Criteria*, Standard & Poor's, June 1, 2001). Although the transactions in issue in *Enron* were not traditional securitizations, the opinions appear to have been "true sale" or "true issuance" opinions, and not the simpler opinions on authority, etc. *In re Enron Corp. Sec. Lit.*, 235 F. Supp. 2d 549, 704 (S.D. Tex. 2002); *see also Enron Final Report*, *supra* note 15, at 48-55, app. C, at 179-202, annex 1, at 25-31.

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defense of lawyers who issue these opinions, asserting that “there is nothing inherently deceptive or illegal about them or the structured-finance transactions on which they opine.”<sup>177</sup> Professor Coffee has responded, observing that these “heavily qualified opinions . . . drone on endlessly like second-rate law review articles.”<sup>178</sup> The lawyer quoted immediately above may lean towards Professor Coffee’s view of things. “[N]ot only [does the true sale opinion] say[] nothing,” this attorney observed, “it says the same nothing in every opinion, so why bother? If you really wanted to start getting rid of opinions, that would be a pretty good place to start.”<sup>179</sup>

#### *B. Substantive and Procedural Limitations on Closing Opinion Practice*

Other challenges to the value of closing opinions are presented by their own internal limitations, as well as the process by which they are rendered.

##### *1. Qualifications*

Third-party closing opinions are rarely offered without qualification. Rather, they are typically qualified or limited in sometimes significant and substantive ways. For example, the TriBar model limits the opinion giver’s statements of fact with qualifications on the source and verification of information contained in the opinion.<sup>180</sup> It makes clear that the scope of the factual investigation undertaken by the opinion giver cannot be ascertained from the letter, itself. “For purposes of this opinion letter,” it provides, “we have reviewed such documents and made such other investigations as we have deemed appropriate.”<sup>181</sup>

177. See Schwarcz, *supra* note 5, at 6. The defense is aggressive—and curious—because there have been few credible claims that true sale opinions in themselves are misleading. Rather, most criticism of this sort has been limited to *Enron* and a few notable cases in which there have been claims of serious financial misconduct by companies engaged in structured finance transactions. *See id.* at 2 n.1 (collecting citations of criticisms of lawyers in *Enron* and *Dynegy*, among others). It is not, however, apparent that one can extrapolate from these criticisms of specific lawyers in arguably unusual circumstances to the general claim that all lawyers engaged in this practice are under attack.

178. John C. Coffee, Jr., *Can Lawyers Wear Blinders?: Gatekeepers and Third-Party Opinions*, 84 TEX. L. REV. 60, 66 (2005).

179. Interview with Attorney K-1, *supra* note 102, at 12. Professor Schwarcz would presumably defend by arguing that a true sale opinion does reduce information asymmetries. Despite the fact that “recipients of such opinions often have the same factual information as opining counsel,” Schwarcz argues, “opining counsel assesses certain legal consequences of that information for the opinion recipients.” Schwarcz, *supra* note 5, at 11 n.54. I note that this may be so, but does not address the question whether these opinions add value. One might think that they suffer the same flaws as the more general enforceability opinions discussed in this section. Since counsel for the recipient will usually have drafted the operative documents (e.g., the pooling and servicing agreement) and have as much, if not more, expertise in securitization, it is not clear why opining counsel’s assessment adds value.

180. *See TriBar 1998 Report*, *supra* note 6, app. A-1, at 667.

181. *Id.* As a matter of customary practice, opinion givers will typically review a standard set of documents, including the documents that caused the Company to be formed, documents indicating the Company’s current existence, other material contracts, the operative agreements for the transaction in

The opinion will also likely qualify the veracity of the information. “As to certain matters of fact material to the opinions expressed herein, we have relied on the representations made in the . . . Agreement and certificates of . . . officers of the Company . . . .”<sup>182</sup> It is not clear how literally one should take this statement, since it is highly likely that the opining lawyer was, in fact, the drafter of both the representations in the operative agreement as well as the certificates signed by the Company’s officers.<sup>183</sup> At least in theory, the opining lawyers will have reviewed these certificates with the Company’s officers in order to “satisfy themselves that the persons providing the factual information understand that the information provided is being relied on in an opinion letter and therefore must be based on knowledge, not surmise . . . .”<sup>184</sup> While we cannot be certain, there is some reason to believe that in many cases something approaching this is done.<sup>185</sup>

It is presumably important to emphasize that the officer has been walked through the certificates because the model opinion then goes on to say that “[w]e have not independently established the facts so relied on.”<sup>186</sup> This qualification is curious because it would seem to be untrue in many cases.<sup>187</sup> If “independently establishing the facts” means learning firsthand or from others (besides the officers of the Company) that a certain state of affairs exists, it would seem likely that, notwithstanding the qualification, this happens frequently. Opining counsel may well take notice of such obvious facts as the existence of the physical plant in which the Company does business and that

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question, and so on. But there is no way, from an opinion with this language, that one could know which documents were reviewed, or whether other documents might also have been important.

182. *Id.*

183. *Id.* § 2.1.3, at 609 (“Opinion preparers typically draft certificates that set forth with precision various key facts.”) (internal footnote omitted).

184. *Id.*

185. It is not, however, clear that stating assumptions about facts made will necessarily protect a lawyer from liability should the assumption prove incorrect. One lawyer had the following observation:

In a syndicated loan transaction where an opinion is out in the marketplace, people hear about it. There are transactions that I know about that were litigated that people gave opinions on and the opinions turned out to be wrong and in some cases or in a couple of cases that I certainly know, it wasn’t the lawyer’s fault, it was because the assumptions, which were reasonable assumptions[,] turned out to be incorrect. The assumptions were assumptions which the opinion recipient accepted.

Interview with Attorney B-1, *supra* note 111, at 10-11.

186. See *TriBar 1998 Report*, *supra* note 6, app. A-1, at 667.

187. It nevertheless appears to be effective. In *Prudential Insurance Co.*, discussed in Part III.A, *supra*, a firm gave a third-party closing opinion as to the enforceability of a \$92 million ship mortgage which—due to a typographical error—was recorded in the amount of \$92,000. Although the New York Court of Appeals concluded that the opining firm owed a duty of care to the recipient lender, the duty was not breached because, among other reasons:

The opinion letter initially made clear that, in rendering its opinion, Gilmartin [the firm issuing the opinion] had relied in part upon certificates of certain public officials and corporate officers, and upon corporate documents and records, with respect to the accuracy of material factual matters which were not independently established.

605 N.E.2d 318, 323 (N.Y. 1992) (emphasis in original).

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the Company's officers are who they purport to be. These facts will, in some sense, be "established independently" by the lawyer. Nevertheless, the qualification is not considered wrong because it "should be regarded as included solely as a matter of emphasis since that reliance [on information provided by the Company] is customary without any express statement."<sup>188</sup>

Opinions are qualified not only as to fact, but also as to law, and in particular, law that may, in some important respect, impair or impede the transaction. Closing opinions are, by their terms, typically offered "subject to bankruptcy, insolvency and other similar laws affecting the rights and remedies of creditors generally and general principles of equity."<sup>189</sup> The exception "excludes from the opinion the effect of laws affecting the rights and remedies of creditors generally that might prevent the opinion recipient from enforcing its rights under the agreement if the company were to encounter financial difficulties."<sup>190</sup> It is not hard to see why this qualification is included. Commencement of a bankruptcy case for the Company may mean, among other things, that the lender-recipient is paid less than the full amount of the loan, or that a secured creditor will be delayed (and perhaps denied) in its attempts to foreclose on collateral.<sup>191</sup>

Qualifications and assumptions obviously exist to protect the opining lawyer, but they may not offer as much protection as lawyers would like. In *Reich Family L.P. v. McDermott, Will & Emery*, for example, a New York court held that the "equitable principles" qualification was ineffective to insulate a firm from liability, even though its opinion had been found in error in an equitable proceeding.<sup>192</sup> The equitable principles limitation is a constraint on the enforceability opinion (or perhaps the entire opinion) to the effect that it is subject to "general principles of equity."<sup>193</sup>

188. See *TriBar 1998 Report*, *supra* note 6, § 2.6, at 618. In a recent, and unhappy, twist of fate, one law firm's attempt to limit its liability through an explicit knowledge qualifier appears to have backfired. In the *National Bank of Canada* case discussed above, the Massachusetts Superior Court denied the firm's motion for summary judgment on claims by plaintiff banks that the firm had made "misrepresentations" in a third-party closing opinion which, among other things, contained an (apparently incorrect) opinion that "to our knowledge, there is no action, suit . . . [etc.] which, if adversely determined, could have a material adverse effect on the business, condition, affairs[,] or operations of [the firm's client, the borrower]." See *Nat'l Bank of Canada v. Hale & Dorr*, 2004 WL 104972, at \*2 (Mass. Super. Ct., Apr. 28, 2004). The opinion was apparently incorrect because there was, at the time, an ongoing patent infringement litigation against the borrower that sought hundreds of millions of dollars. One of the attorneys interviewed for this project noted that, while the result "comes out correctly," it was nevertheless a "terribly reasoned opinion obviously written by a . . . trial court judge who was a litigator . . ." Interview with Attorney K-2, *supra* note 57, at 4.

189. See *TriBar 1998 Report*, *supra* note 6, app. A-1, at 668. At least according to the practitioner's literature, such an exception would apply even if not expressly stated in the opinion itself. See *id.* at 623.

190. GLAZER, OPINIONS, *supra* note 2, § 9.10.1, at 266.

191. See, e.g., 11 U.S.C. §§ 362(a)(3)-(5), 1129(b)(2)(A) (2005) (staying acts to enforce interests in property of the debtor's estate and to "cram down" secured claims).

192. *Reich Family L.P. v. McDermott, Will & Emery*, No. 101921-03, 230 N.Y.L.J. 20 (N.Y. Sup. Ct. Oct. 29, 2003).

193. *TriBar 1998 Report*, *supra* note 6, § 3.3.1, at 623. Glazer indicates that the limitation

In *Reich*, the firm of McDermott, Will & Emery was special counsel to a financially distressed company. An investor, Reich, demanded as a condition to an investment in the company that its founder, Adlerstein—who was the CEO, chairman of the board, and majority shareholder—be ousted. This was accomplished pursuant to a transaction which, McDermott, Will & Emery opined, had been duly authorized.<sup>194</sup> Not surprisingly, Adlerstein, the CEO, sued the company and the other directors. He won on the grounds that he lacked notice of the meeting at which the investment and his ouster occurred.<sup>195</sup>

Reich thus lost his investment. He then sued McDermott, Will & Emery, claiming its due authority opinion was wrong. The New York Supreme Court agreed with Reich, despite the law firm's defense based on the presence of an equitable limitations clause in the opinion.<sup>196</sup> The equitable principles limitation did not protect McDermott, Will & Emery because, the court reasoned, it “applies by its terms to issues of good faith and fair dealings between the parties to the agreement, not to the [CEO's] lawsuit seeking to invalidate the results of the July 9th meeting.”<sup>197</sup>

Though it is not clear what this means, the court got to the right result. According to the practitioner's literature, this limitation would not appear to apply to inequitable conduct leading up to a closing. Rather, it applies to a post-closing determination by a court not to enforce (or otherwise to recognize) an element of a transaction on equitable grounds. It “relates to those principles courts apply when, in light of facts or events that occur *after* the effectiveness of an agreement, they decline in the interest of equity to give effect to particular provisions in the agreement.”<sup>198</sup> Thus, while it is true that the equitable principles limitation should not have applied to Adlerstein's lawsuit seeking to invalidate the improperly called board meeting, this was not because, as the court suggested, the limitation “applies by its terms to issues of good faith and fair dealings.”<sup>199</sup> Rather, it was simply because the inequitable conduct there preceded—and thus precluded—a transaction that the legal opinion (incorrectly) claimed was authorized.

Qualifications and assumptions appear to have been especially important in Enron's transactions. The Examiner's *Final Report* indicates that certain of Vinson & Elkins' “true issuance [opinions] . . . assumed . . . [that] a court would not recharacterize the entire transaction, when viewed in its entirety, as a

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originally applied to the enforceability opinion. More recently, however, “a practice has developed among some lawyers of drafting the limitation to qualify all the opinions in their closing opinions rather than simply the enforceability opinion.” GLAZER, *OPINIONS*, *supra* note 2, § 9.9, at 261.

194. Adlerstein v. Wertheimer, No. CIV. A. 19101, 2002 WL 205684 (Del. Ch. Jan. 25, 2002).

195. See *id.* (discussing underlying litigation).

196. *Reich Family*, 230 N.Y.L.J. at 20.

197. *Id.*

198. See 1998 *TriBar Report*, *supra* note 6, § 3.3.4, at 625 (emphasis supplied).

199. *Reich Family*, 230 N.Y.L.J. at 20.



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loan.”<sup>200</sup> David Keyes, a Vinson & Elkins attorney involved in many Enron transactions, claimed that this assumption was there to “‘put people on notice [that] we’re not giving a true sale opinion.’”<sup>201</sup> This was important because it appears that Vinson & Elkins believed it could not give a true sale opinion—even though, according to the Examiner, that was the opinion that the transactions in question called for.<sup>202</sup> Vinson & Elkins’ “‘no recharacterization’ assumption would,” according to the Examiner, “thus be assuming away the very issue that a true sale opinion purported to address—whether the transaction was really a sale or a loan.”<sup>203</sup> Whatever else may be true of Enron and its lawyers, it would appear that qualifications and assumptions in closing opinions undercut their informational value.

#### *2. Process Problems: Timing and Heterogeneous Expectations*

Closing opinions are, to a significant extent, creatures of customary practice. Among other things, this means that opinions at a functional level are written and delivered in much the same way as other documents used in a large business transaction.<sup>204</sup> In a typical modern transaction, the third-party closing opinion will be one of several exhibits to the “main” operative document (e.g., the loan agreement). In its initial form, it will usually be delivered by recipient’s counsel to the attorney expected to provide the opinion (i.e., counsel to the company).

Depending on the nature of the transaction, the parties may simultaneously be conducting legal due diligence and negotiating business aspects of the deal. When all goes well, the lawyers will negotiate the opinion as part of this process. Thus, if an important term in the contract changes, or due diligence produces surprising information, the lawyers with principal responsibility should take that into account in the opinion. As the designated closing date approaches, the paperwork, which includes the opinion itself, is finalized, and a

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200. *Enron Final Report*, *supra* note 15, app. C, at 34-35. For example, in “Project Cornhusker”—a transaction which purportedly involved a “true issuance” of certain securities—Vinson & Elkins’ opinion “contained the assumptions that a court would not ‘(i) recharacterize the issuance of the Class B Membership Interest by NBIL . . . as a loan to NBIL supported by a security interest in [its] Class B Membership Interest, or (ii) recharacterize the [t]ransactions as a loan to Northern Plains supported by a security interest in the [financial assets].’” *Id.* at 35 n.99 (citation omitted).

201. *Id.* at 35 (quoting Sworn Statement of David Keyes, Vinson & Elkins, to Mary C. Gill, Alston & Bird, Oct. 1, 2003, at 85).

202. *Id.* at 34 n.98 (“Keyes . . . remarked to Arthur Andersen [Enron’s accountants] . . . that he believed that they were requesting the wrong opinions . . . [Keyes] didn’t think what they [Andersen] were asking for was what his reading of the corporate rules required.” (quoting Sworn Statement of Ronald T. Astin, Vinson & Elkins, to Rebecca Lamberth, Alston & Bird, Aug. 12, 2003, at 36-37)).

203. *Id.* at 35 (citation omitted).

204. The discussion in this subsection is drawn from the interviews conducted and my own experience as a corporate lawyer, as well as such useful sources as FREUND, *supra* note 23. A nice, brief discussion of certain aspects of the larger process of documenting complex business transactions is set forth in Claire A. Hill, *Why Contracts Are Written in ‘Legalese,’* 77 CHI.-KENT L. REV. 59 (2001).

location is designated as a repository for the documents. At closing, the parties typically confirm that there have been no material changes in the interim, and then execute and deliver the documents, including the third-party closing opinion, as it may have been refined and agreed to by the parties (or, more likely, the lawyers).

Of course, things do not always go well and the closing opinion is sometimes viewed as the culprit. Lawyers observe that closing opinions are not always negotiated or discussed during the development of the other aspects of the transaction. Rather, they are left to the end of the transaction. Sometimes, this may be because the recipient failed to provide the form it wanted early on; other times it may be because the opining lawyer has failed to focus on it. Either way, last-minute changes to the transaction may well affect the opinion.

Another source of delay may come from the way that the opinion-giving firm handles opinions. Some firms, for example, have policies that require all opinions (or opinions in transactions of a certain size or type) to be reviewed and approved by a standing opinion committee in the firm.<sup>205</sup> Other firms require “second-partner” review. Here, the idea is that an attorney, who is not necessarily an expert on opinion writing, is apprised of the transaction and the opinion to be delivered.<sup>206</sup> In either case, even if counsel began to discuss the opinion early on in the transaction, its resolution may be delayed until the last moment due to these institutional procedures.

Although the market-signaling view of closing opinion practice discussed above equates value with indicia of procedural regularity, this procedural regularity will be achieved in a cost-effective way only if the lawyers share expectations and a certain level of sophistication about the appropriate opinions to request and receive in the transaction. This is not always the case. Several lawyers from large firms, for example, indicated that they would be concerned when working with an attorney from a small firm or a firm with an unsophisticated practice who signed an opinion in exactly the form requested—without any challenge or negotiation:

I think everybody has done deals with [a] lawyer who basically, you give him a template of the opinion and he gives it back to you with the law firm’s name stamped at the top. It’s nice that I got what I asked for, but no thought went into this

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205. As Attorney W-3 explained:

We have a policy within our firm that when third-party opinions are given, the opinion has to be signed off on in a particular way by various people, including a member of the Opinion Committee, and we have a number of people in the firm who form that committee and are supposed to look at the opinion not really as a matter of the substance of the opinion—is it right or wrong—per se, so much as to make sure that it conforms to the types of things we will and won’t put in opinions—the way we try to say things. Also, to try to identify issues the person . . . writing may not be aware of.

Interview with Attorney W-3 (May 5, 2004), transcript at 7.

206. See Interview with Attorney B-1, *supra* note 111, at 12.

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. . . . [W]hat can I do [with this]?<sup>207</sup>

As another lawyer said, “If I get an opinion back that is verbatim [of] what I asked for, . . . it invariably has an effect on [my view of] the quality of diligence.”<sup>208</sup> An opinion signed in this way “would give me pause,” one lawyer said, because “you want to know that the opinion provider has thought through the opinion issues . . . . [I]f they are just signing a piece of paper so their client can get the loan, you might want to take additional steps to make sure you’re comfortable.”<sup>209</sup> The effect will generally be to cause the lawyer to scrutinize the opinion-giver’s work more carefully. This would seem likely to increase cost, not reduce it.<sup>210</sup>

Even among sophisticated lawyers, differing expectations can lead to costly disputes over closing opinions. “[L]awyers who understand the parties’ expectations for opinions,” one lawyer observed, “are willing to step to the plate and go through the analysis that needs to be done to give the opinion.”<sup>211</sup> Lawyers who do not, however, can create costly problems. As this same lawyer observed, “it is not good lawyers who make opinion practice difficult, it is bad lawyers.”<sup>212</sup> “Bad” in this context means lawyers who fail to appreciate proper closing opinion decorum, who make last-minute changes or demands, or who fail to distinguish “big” from “small” issues.

And, just because a law firm has a large and sophisticated practice does not mean that any given lawyer has expertise in opinion writing, especially if the attorney is fairly junior. As one lawyer explained, “[a] lot of people simply aren’t aware of the niceties of opinion writing.”<sup>213</sup> Another attorney (in-house counsel for a large public company) explained that when she would occasionally receive legal bills indicating what she believed to be an excessive amount of time devoted to closing opinions, she would call the firm to ask (facetiously): “What associate[s] were we training on this one? Were they doing well?”<sup>214</sup> A partner in the New York office of a national firm told the following anecdote:

[W]e had a little fight [in one deal] just because there was a very junior lawyer who . . . kept saying you have to give all these opinions and some of them didn’t make sense. I don’t think PUHCA [the Public Utilities Holding Company Act] mattered or the Investment Company Act mattered very much, but they kind of said it did, and then finally, you know, we got somebody more senior . . . to say no, down boy,

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207. *See id.*

208. *See id.*

209. Interview with Attorney S-2, *supra* note 99, at 18.

210. Interview with Attorney C-1, *supra* note 58, at 12.

211. *Id.* at 23.

212. *Id.*

213. Interview with Attorney W-3, *supra* note 205, at 7.

214. Interview with Attorney M-2, *supra* note 86, at 10. This attorney also noted that this occurred infrequently (less than once per year, assuming that she did at least one deal per month), and that outside counsel would generally “work it out.” *Id.*

you don't really need those.<sup>215</sup>

### *C. Externalizing Costs onto Lawyers*

Ordinarily, liability rules address lawyers' professional errors, and this is as true of the closing opinion as any other facet of practice. It is tempting to imagine that the threat of lawyer liability adds value to closing opinions. After all, if lawyers were not concerned about liability for errors in their opinions, they most likely would care less about the quality of their opinions, which would in turn undermine their informational value. In fact, the link between liability and the informational function of closing opinion practice is elusive. Lawyers certainly express great concern about the risk of liability. It is not, however, clear that the value created by the risk of liability exceeds the costs it creates; nor is it clear that value is created in acceptable ways. As several lawyers observed, imposing liability on lawyers for opinion errors may simply externalize the risk of transaction failure onto the lawyers, imposing a cost for which they believe themselves inadequately compensated. "An opinion," the *1998 TriBar Report* explains "is not a guaranty of an outcome, but rather an expression of professional judgment."<sup>216</sup>

#### *1. Legal Liability*

Historically, legal liability has been something of a puzzle in this area of practice. In 1989, Professor Freeman surveyed extant case law, and concluded that it "strongly suggest[s] that courts today are willing to go to considerable lengths to protect lawyers who assist their business clients, even where the lawyer's assistance furthers client misconduct."<sup>217</sup> And, while there are certainly cases in which lawyers have been held liable for opinion errors, lawyers suggest that legal liability was historically a somewhat remote concern. Today, however, lawyers express increasing anxiety about liability for their opinion letters, and find support for this concern in recent decisions.<sup>218</sup>

Whatever doctrinal clarity there is in this field comes from the Restatement (Third) of the Law Governing Lawyers, which provides that the lawyer rendering the third-party closing opinion "must exercise the competence and diligence normally exercised by lawyers in similar circumstances."<sup>219</sup> A lawyer

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215. Interview with Attorney S-2, *supra* note 99, at 16.

216. *TriBar 1998 Report*, *supra* note 6, at 596.

217. See John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235, 251.

218. See GLAZER, OPINIONS, *supra* note 2, § 1.6.3, at 26-27 ("At one time cases involving closing opinions were rare . . . . That is no longer the case.") (footnote omitted).

219. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (2000). Note that determining what constitutes "similar circumstances" may be difficult. Does the customary practice of the lawyers in the opinion-giver's community apply? Or must the opinion-giver live up (or down) to the customary practices of lawyers in the recipient's community? The Restatement provides little guidance

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rendering an opinion is expected to possess “the skill and knowledge normally possessed by members of that profession . . . in good standing.”<sup>220</sup> This does not require the lawyer to perform with a high or even an average level of skill, as this would “imply that the less skillful part of the profession would automatically be committing malpractice.” Rather, the duty “is one of reasonableness in the circumstances.”<sup>221</sup>

This general standard of care applies to all lawyer-client relationships. The Restatement also provides rules on the lawyer’s duty to nonclients, as in the rendering of third-party closing opinions. Restatement § 51(2) provides that a lawyer owes the foregoing duty of care “to a nonclient when and to the extent that: (a) the lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the nonclient to rely on the lawyer’s opinion . . . and the client so relies; and (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.”<sup>222</sup>

While courts have certainly held attorneys liable to third parties for negligent misrepresentations (or similar claims) in the third-party closing opinion letter,<sup>223</sup> many other courts have not, even when an opinion letter apparently contained significant errors.<sup>224</sup> At least historically, courts have used several doctrinal moves to protect lawyers from liability for errors in their opinions. Courts have, for example, exonerated lawyers on theories that the recipient should not have relied on the opinion,<sup>225</sup> the absence of privity of contract,<sup>226</sup> or simply that the error itself was not a breach of duty.<sup>227</sup>

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on this point. “The professional community whose practices and standards are relevant in applying [the] duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction (typically a state).” *Id.* § 52 cmt. The problem, however, is that the parties’ lawyers may be in different states. It would appear inconsistent with the Restatement to hold the opinion-giving lawyer to the standards applicable in the recipient’s lawyer’s jurisdiction. Yet, the difference in standards may be inconsistent with the recipient’s expectations. Perhaps the answer is, as suggested in the Restatement, that many practices which involve opinions are “national” in scope, and so a single standard would apply to all lawyers involved in the transaction. *Id.* Yet, this is unsatisfying because inconsistent with the experiences described by practitioners. As discussed below, while there is a trend toward nationalizing many types of practice, many small firms in remote locations are often involved in transactions with large firms in major cities. The differences in customary practice between them may well be large, even if the type of transaction in question is national in character or scope.

220. *Id.* § 52 cmt. b (citing RESTATEMENT (SECOND) OF TORTS § 299A).

221. *Id.* § 2 cmt. b.

222. *Id.* § 51(2).

223. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Crossland Savs. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274 (S.D.N.Y. 1988) (applying New York law); *Vereins-Und Westbank, AG v. Carter*, 691 F. Supp. 704 (S.D.N.Y. 1988).

224. The *WPPSS* and *Prudential* cases discussed in Parts II.A.1 and III.A, *supra*, respectively, are good examples of this. See also *Council Commerce Corp. v. Schwartz, Sachs & Kamhi*, 534 N.Y.S.2d 1 (N.Y. App. Div. 1988); *United Bank of Kuwait v. Eventure Energy Enhanced Oil Recovery Assoc.*, 763 F. Supp. 729 (S.D.N.Y. 1990); *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 581 N.E.2d 138 (Ill. App. Ct. 1991).

225. See, e.g., *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247 (6th Cir. 1997), *rev’d en banc*, 143 F.3d 263 (6th Cir. 1998).

226. See, e.g., discussion *supra* note 123. No discussion of privity is complete without mention of

These moves led some to believe that lawyers were most likely to be held liable for errors in third-party closing opinions only if the errors were truly egregious or were part of a more damning set of facts, such as the *NSMC* scandal discussed above. Thus, the house organ for one of the legal malpractice insurers, the Attorneys' Liability Assurance Society (ALAS), noted that "the liability danger usually does not lurk in the opinion itself."<sup>228</sup> Rather, client fraud or a conflict of interest by the attorney—what some refer to as an "x-factor"—were the more likely paths to lawyer liability.<sup>229</sup> Given the fact-sensitive nature of these cases, it is not surprising that a pattern is difficult to discern.<sup>230</sup>

Many of the lawyers interviewed for this project acknowledged that they

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*Ultramares Corp. v. Touche*, 174 N.E. 441 (1931). Here, accountants were sued for negligent misrepresentation and fraud by creditors of a company who allegedly relied on erroneous financial statements prepared by the accountants. *Id.* at 442. Justice Cardozo famously observed that the accountants had no duty of care to the creditors, because they merely constituted an "indeterminate class of persons who, presently or in the future, might deal with the [company] in reliance on the audit." *Id.* at 446 (noting that holding the accountants liable to creditors, at least for negligent misrepresentation, would, among other things, create unacceptable risks for lawyers). Cardozo explained as follows:

Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser.

*Id.* at 448.

227. See *supra* note 96 and accompanying text.

228. See William Freivogel, *The Ethics and Lawyer Liability Issues Raised by Closing Opinions*, 2 LOSS PREVENTION J. 2 (1998). Information about ALAS may be found at <http://www.alas.com>.

229. *Id.* at 4 ("Client fraud is one danger. Usually, the opinion will have no bearing on the case except to support an argument that the author was, in fact, assisting the client in committing the fraud. The other real danger is conflicts of interest.")

230. In the following cases, there appears to have been no "x-factor" (e.g., no fraud or conflict of interest by the lawyers) and no liability for an erroneous opinion: *United Bank of Kuwait v. Enventure Energy Enhanced Oil Recovery Assoc.*, 763 F. Supp. 729 (S.D.N.Y. 1990); *Vanguard Prod., Inc. v. Martin et al.*, 894 F.2d 375 (10th Cir. 1990); *Alpert v. Shea Gould Climenko & Casey*, 559 N.Y.S.2d 312 (N.Y. App. Div. 1990); *Molecular Tech. Corp. v. Valentine*, 925 F.2d 910 (6th Cir. 1991); *Prudential Ins. Co. of America v. Dewey Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 320 (N.Y. 1992); *Austin v. Bradley, Barry & Tarlow, P.C.*, 836 F. Supp. 36 (D. Mass. 1993); *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 894 F. Supp. 777 (D. Vt. 1995); *Mark Twain Kan. City Bank v. Jackson et al.*, 912 S.W.2d 536 (Mo. Ct. App. 1995).

In the following cases, there apparently was no "x-factor" but the lawyers nevertheless were held liable for opinion errors: *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901 (Cal Ct. App. 1976); *Cambridge Factors v. Sturges & Mathes*, 1992 Conn. Super. LEXIS 2140 (July 15, 1992); *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561 (N.D. Ga. 1992); *Mehaffy et al. v. Cent. Bank Denver*, 892 P.2d 230 (Colo. 1995); *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995).

In the following cases, lawyers were found liable (or potentially liable) where their opinions were erroneous in the presence of an x-factor: *Terremar, Inc. et al. v. Ginsburg & Ginsberg et al.*, 1991 Conn. Super. LEXIS 747 (Apr. 4, 1991) (fraud); *Superior Bank FSB v. Golding*, 605 N.E.2d 514 (Ill. 1992) (forgery). White & Case's experience in the *National Student Marketing Corp.* case, discussed, *supra*, would also appear to constitute loss due in part to an "x-factor." See 457 F. Supp. 682 (D.D.C. 1978). Of course, we do not yet know what will happen in *Enron*. The *Reich* decision, discussed above and below, may also be an example of an "x-factor," in that the board apparently failed to act in good faith. See *Reich Family L.P. v. McDermott, Will & Emery*, No. 101921-03, N.Y. Sup. Ct., 230 N.Y.L.J. 20 (Oct. 29, 2003).

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personally knew of no lawyers who had been sued for errors in a third-party closing opinion and held liable (or settled for more than nominal damages).<sup>231</sup> As one attorney explained, “Empirically it hasn’t been significant in terms of the claims against and the ultimate hits on malpractice insurance policies. Opinion issues represent a very, very small number” of malpractice claims.<sup>232</sup> Another attorney observed, “I know that establishing malpractice liability requires more than that the opinion be wrong, it has to be negligent.”<sup>233</sup> Thus, he said, “We’ll tell [our clients] the lenders this [opinion] is not a guarantee of this, but these good lawyers have done a careful job in giving this opinion, and you can take a lot of comfort from that as far as your diligence in determining whether the proper steps have been taken to validate this contract.”<sup>234</sup> Another attorney put it more bluntly (if optimistically): “I know that it is an opinion and when all is said and done, you are sort of entitled to be wrong.”<sup>235</sup> According to several lawyers, historically, institutional clients (in particular, banks) had a similar view, as they did not generally treat opinions as liability-creating documents.<sup>236</sup> If this were true, the threat of liability would add little value, because there would in fact be little threat.

Yet lawyers also express concern about increasing risk of liability for errors in their closing opinions. One attorney from a mid-sized West Coast firm observed:

[T]he fact that there aren’t a lot of cases to hold lawyers liable and there isn’t a lot of experience of lawyers being sued, doesn’t mean that people aren’t fearful of it nevertheless. It’s like fastening your seatbelt on an airplane. I don’t know anyone who’s been through a plane crash, much less someone who has been through a crash who would not have survived if they weren’t wearing their seatbelt. Nevertheless, I buckle my belt low and firm across the lap.<sup>237</sup>

Imposing legal liability for opinion errors would “allow[] the lender [in loans] to have recourse against another party if . . . it is unable to enforce the loan documents. . . . [P]resumably, if the lender has received an opinion from the borrower’s counsel, then [the lender] can turn to that counsel and say ‘okay, now make us whole for it.’”<sup>238</sup> Courts in Massachusetts,<sup>239</sup> New York,<sup>240</sup> and

231. See, e.g., Interview with Attorney O-1 (May 11, 2004), transcript at 4 (“I don’t know whether that’s sort of the last vestiges of gentlemanly behavior among lawyers that we don’t tend to sue on them. I’ve never seen an opinion sued [on in] my practice, although I certainly know there are cases, particularly in New York, the last 15 years where there was an opinion sued on . . .”).

232. Interview with Attorney C-1, *supra* note 58, at 4.

233. Interview with Attorney B-1, *supra* note 111, at 5.

234. *Id.* This sentiment is echoed in the ABA’s *Legal Opinions Principles*, reprinted as an Appendix to the *ABA 2002 Guidelines*, stating, “The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.” *ABA 2002 Guidelines*, *supra* note 11, § 1.C., at 883.

235. Interview with Attorney O-1, *supra* note 231, at 4.

236. See, e.g., Interview with Attorney C-2, *supra* note 78, at 8.

237. Interview with Attorney L-1, *supra* note 142, at 4.

238. *Id.* at 2.

239. *Nat’l Bank of Canada v. Hale & Dorr*, No. 2000000296, 2004 WL 1049072 (Mass. Super. Ct.

Pennsylvania<sup>241</sup> have all recently indicated that this may be an appropriate result.

For example, in the *Reich Family L.P.* case discussed in Part III.B.1, above, the lawyers were held liable for errors in a due authority opinion because the underlying transaction was challenged on good faith grounds.<sup>242</sup> In agreeing with the plaintiff, the New York Supreme Court explained:

The opinion letter stated that each of the transaction documents had been duly authorized by all necessary corporate action on the part of the Company. Yet, as a result of the decision of the Court of Chancery, the [underlying] transaction was invalidated on the basis that the corporation had not provided [CEO] with the required notice of the planned transaction.<sup>243</sup>

As noted above, closing opinions apparently also played a role in the *Enron* scandal, and may expose Enron's deal counsel to liability, although this is currently far from settled. On the one hand, the Examiner cited them as one of the grounds for determining that Vinson & Elkins (V&E) (and perhaps Andrews & Kurth (A&K)) could be held liable.<sup>244</sup> They have been characterized as "crucial" to Enron's ability to complete many of its questionable transactions.<sup>245</sup> On other hand, it is not clear how many were truly

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Apr. 28, 2004).

240. *Reich Family L.P. v. McDermott, Will & Emery*, No. 101921-03, 230 N.Y.L.J. 20, 20 col. 1 (N.Y. Sup. Ct. Oct. 29, 2003).

241. See *Ruling by Pa. Court Could Set Precedent on Advice to Banks*, 169 AM. BANKER 4 (2004), 2004 WL 55827749. This article discusses the recent unpublished decision in *Republic First Bank v. Abrahams, Lowenstein and Bushman*, No. 0409, March Term 2002 (Pa. C.P. Philadelphia July 2, 2004). There, lawyers for a bank—who had previously represented the borrower—concealed the fact that the borrower lacked the ability to grant a mortgage in a leasehold, because the landlord had withheld its consent. Nevertheless, the firm gave the bank an opinion on the enforceability of the mortgage against the borrower. In awarding over \$4 million in compensatory and punitive damages, the judge indicated that "[t]he court is particularly disturbed over the opinion letter," the issuance of which the court viewed as "an outrageous thing to do." *Id.* It would appear the opinion here was technically a first party opinion, in that the firm that issued the opinion also represented the recipient-bank. *Id.*

242. *Reich Family*, 230 N.Y.L.J. at 20.

243. *Id.* Reading between the lines, two additional factors may have influenced the court. First, the law firm was apparently involved in advising the directors about the action that led to the ouster of the CEO. If the directors were not acting in good faith, perhaps the lawyers were not, either. Second, some partners of the law firm owned interests in the company, which interests were not disclosed to Reich. Reich claimed that this amounted to fraud by the law firm. Although the New York court disagreed and dismissed that claim, the presence of either or both "x-factors" may have contributed to the court's overall view of the firm's behavior. Ironically, Reich himself was not the most sympathetic character. A former partner of the law firm of Wachtell, Lipton, Rosen & Katz, Reich was jailed and disbarred for participating in the 1980s insider-trading ring led by former Drexel Burnham banker Dennis Levine. He served eight months of a 366-day sentence, and was eventually reinstated to the New York bar before becoming a private investor. *Id.*

244. Neal Batson, one of the Enron Examiners, noted that opinions were in issue in three of the nine transactions discussed in the Report that indicated potential liability of V&E. *Enron Final Report*, *supra* note 15, at 48-49.

245. See *Enron Final Report*, *supra* note 15, app. C, at 27 ("An attorney's willingness to provide certain legal opinions was, as a practical matter, crucial to Enron's ability to complete" certain transactions); see also Rebecca M. Lamberth & Lynn A. Soukup, *Summary of the Pertinent Legal Framework and Opinion-Related Conclusions of the Enron Examiner*, SJ093 ALI-ABA 125, 136 (American Law Institute—American Bar Association Continuing Legal Education, 2004).



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third-party (as distinct from first-party) closing opinions<sup>246</sup> or that by themselves they played a significant role in establishing the firm's exposure. After all, if V&E (or A&K) did not issue opinions, it is possible that some other law firm would have, thereby costing these firms the work.

At least in the case of V&E, real exposure may derive from having issued the so-called "white-wash report," in which it approved of these very transactions, despite its concerns, and despite its apparent conflict of interest in rendering such a report.<sup>247</sup> Although other firms performed significant work for Enron, or Enron-related entities, only V&E issued this report, and of the law firms sued thus far, only V&E failed to get out of the case at the pleadings stage. Although Judge Harmon did not say so in her decision on the motion to dismiss the securities fraud complaint, it may be that other firms that also structured transactions and issued opinions were not liable for securities law violations because the documents they drafted were "for private transactions" between Enron and its related entities.<sup>248</sup>

It is probably too early to draw broad conclusions about closing-opinion liability from the *Enron* scandal.<sup>249</sup> Nevertheless, it would appear that, like the *NSMC* scandal before it, *Enron* has generated a significant amount of anxiety about closing opinion practice. Surveying *Enron* and other recent decisions, one prominent attorney suggested that a sea-change may be in the works. He indicated that he expected to see more suits against lawyers for alleged errors in opinions because "otherwise respectable [transaction] participants are . . . now more willing to be plaintiffs . . ." <sup>250</sup> "[P]eople are trying all sorts of wild ways to pull lawyers into the transaction," another lawyer observed,

246. At least some were. See *In re Enron Corp. Sec. Lit.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002) (discussing opinions issued to J.P. Morgan, among others); see also Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 202 (2003) ("Citigroup personnel testified under oath . . . that they had two legal opinions, one from Milbank, Tweed, Hadley & McCloy, Citigroup's lawyers, and the other from Vinson & Elkins, Enron's lawyers, assuring Citigroup, in one way or the other, that its round-and-round deals with Enron were legitimate.") (citing 2002 WL 1722723 (F.D.C.H.) (testimony of Richard Caplan, Managing Director & Co-Head, Credit Derivatives Group, Salomon Smith Barney/Citigroup)).

247. See *In re Enron Sec. Lit.*, 235 F. Supp. 2d at 636 ("Vinson & Elkins issued a whitewash report dismissing these detailed complaints of fraud even though the law firm knew the allegations were true because it was involved in structuring many of the manipulative devices.").

248. See *id.* at 706 ("Any opinion letters that [Kirkland & Ellis, another defendant law firm] wrote are not alleged to have reached the plaintiffs nor been drafted for the benefit of the plaintiffs.").

249. Indeed, as John Coffee has observed, any lessons may be difficult to draw from the case: [T]he problem with viewing Enron as an indication of any systematic governance failure is that its core facts are maddeningly unique. Most obviously, Enron's governance structure was sui generis. Other public corporations simply have not authorized their chief financial officer to run an independent entity that enters into billions of dollars of risky and volatile trading transactions with them; nor have they allowed their senior officers to profit from such self-dealing transactions without broad supervision or even comprehension of the profits involved. See John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1404 (2002).

250. Interview with Attorney K-2, *supra* note 57, at 6.

almost [as] aiders and abettors, if you will, of whatever bad thing has happened to them because you gave an opinion that says this was okay, and it turned out not to be okay, and therefore we were harmed and yes, the company said it was okay, and yes, it was the company that has no assets. . . . I . . . think there's a much higher degree of potential litigation risk that surrounds being part of that opinion.<sup>251</sup>

Would increased exposure to legal liability result in better opinion practice? Not necessarily, according to one lawyer. The apparent trend toward holding lawyers liable on opinions means, he said, that "we'll end up with a lot more negotiations taking place as to what are proper, acceptable exceptions and what aren't."<sup>252</sup> But the value of the opinion wouldn't necessarily change because lawyers' level of diligence and information production will not necessarily have changed. "It should," he said "come out equal" to what it would have been in the absence of the increased risk of liability.<sup>253</sup>

The economic value of lawyer liability is ultimately difficult to assess. It is easy to imagine that the threat of liability keeps lawyers diligent, and that this diligence adds value. There are, however, two problems with this proposition. First, lawyers often adamantly insist that their care and handling of closing opinions is not governed in any significant way by the threat of liability. Rather, as one lawyer explained, reputational concerns "drive[] careful opinion practice more than potential exposure to liability."<sup>254</sup> At least according to this lawyer, the prospect of repeat play, not the risk of loss, may motivate good closing opinion practice.

Second, lawyers suggest that they are not adequately paid to take the risk of any significant loss resulting from opinion errors. As one lawyer explained, "our pricing doesn't reflect [third-party opinion liability] as a risk."<sup>255</sup>

[W]e're not getting paid to take that risk, therefore, one shouldn't have any risk, in theory. You should have risk to your own client, but that's for true malpractice, for failure to do what you're supposed to do. None of us bargain to have risk with a third-party. Why should we bear the risk to that third-party when it's really the client who didn't pay back the loan or whatever—that's the cause of the loss? Why should it be shifted to our shoulders?<sup>256</sup>

Another attorney offered a slightly more sophisticated theory of

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251. *Id.* That said, another attorney observed:

If you have a crook for a client who is defrauding someone, it doesn't make any difference how well you write the opinion, you're still going to get nailed. And conflicts of interest—if you allow yourself to be identified with too many parties where they can claim they thought you were their lawyer and then the wheels come off the deal and people get disadvantaged—they'll start looking around for people to sue, and they'll sue the lawyer for having a conflict. You favored the other guy over me.

Interview with Attorney F-1 (May 20, 2004), transcript at 3.

252. Interview with Attorney K-2, *supra* note 57, at 7.

253. *Id.*

254. *Id.* at 13.

255. Interview with Attorney K-3, *supra* note 85, at 11.

256. *Id.* This attorney acknowledged that this was "a visceral reaction. I can't say that it's a very studied analysis, but it is true. I think I share that same view that we . . . worr[y] about liability . . . but at the end of the day, we probably will never have any." *Id.*

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externalization, suggesting that closing opinions may exhibit a form of “reverse tying.”<sup>257</sup> According to this attorney, opinion practice is:

A reverse tying arrangement, in that the borrower does not have to buy something extra from the bank, but what the borrower does have to do is to run through this particular hoop. . . . [w]hich is not its own hoop. It's someone else's. Somebody else has to run through this hoop—not the borrower.<sup>258</sup>

If true, this would help to explain why clients themselves evince little interest in improving opinion practice, but may be increasingly willing to sue lawyers after the fact. The opinion is not the client's “problem” (hoop). While company managers may not want to pay the legal fees associated with the opinion, they are largely indifferent to the entire process because the manager “doesn't understand the intricacies and has no patience with it.”<sup>259</sup> “[I]f the people who are paying the bills don't understand what is going on, . . . what you have is the mental patients running the institution.”<sup>260</sup> The prospect of lawyer liability may encourage this indifference, since it gives the client an *ex post* source of recovery that may not have been fully priced in.

One response may be that lawyers are (or at least believe they are) getting paid to take the risk, because they continue to take the work in the face of the perception that lawyers will increasingly end up as defendants in a lawsuit arising from the transaction. Moreover, they adequately price for this risk, since they charge enough to cover malpractice premiums which, in turn, protects them against the real risk of (most) legal liability. This counter-argument would perhaps find support in the eyes of many clients, who pay significant and rising fees to lawyers.<sup>261</sup>

#### 2. Reputational Costs

The case for legal liability in opinion practice is complicated, and it is not surprising, as discussed above, that courts have at least historically been reluctant to hold lawyers liable for mere errors in their opinions. But lawyers are not only concerned about legal liability. Perhaps an even greater concern (at least historically) has been reputational damage from providing an opinion that turns out, in hindsight, to have been inaccurate.

Reputational liability describes the shame that might attend the discovery of an error in a third-party closing opinion. “I think lawyers are always concerned about the reputational aspect of it,” one attorney explained.<sup>262</sup> “I think that frankly drives careful opinion practice more than potential exposure to [legal]

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257. Interview with Attorney G-1, *supra* note 103, at 26.

258. *Id.*

259. *Id.*

260. *Id.*

261. *See id.* at 8 (“I bet you since 1970 . . . the fee for a partner has gone up 10 times.”).

262. Interview with Attorney K-2, *supra* note 57, at 15.

liability. At the end of the day, we sell our professional reputation.”<sup>263</sup> As James Freund observed thirty years ago, “There is no aspect of an acquisition that lawyers are more sensitive about than the opinion they are asked to provide.”<sup>264</sup>

Being perceived as sloppy in opinion writing can have consequences both for the lawyer and the client. As to the lawyer, there is presumably the loss of repeat business. There may also be broader implications, if word leaks into the larger market for legal services, although it is difficult to see how sloppiness in opinions alone would have this effect. For clients, “[a] sloppy opinion process or wrong opinion process leads to questions of sophistication and understanding, which can influence how one approaches a transaction,”<sup>265</sup> one attorney said. This attorney indicated that he had not seen transactions fall apart because of a lawyer’s sloppiness with respect to the opinion, but said it would nevertheless affect the nature and amount of work he did in the transaction, even though he was representing a different party (e.g., the recipient).<sup>266</sup>

Reputational liability is an admittedly complex social and psychological phenomenon. First, while lawyers express concern about the effect of errors in opinions on their reputations, it is not clear that errors in fact affect reputation in any significant way. After all, some of the nation’s more prestigious firms have encountered trouble with their opinions, including White & Case, Hale & Dorr,<sup>267</sup> and Dewey Ballantine. These remain prestigious firms. A related and more subtle point (perhaps borne out by the infamous *WPPSS* and *Prudential* cases discussed above) is that there is a reputational tipping point whereby if enough people get it wrong, then no one’s reputation suffers.

Second, lawyers indicated that it is often very difficult to isolate the effect that the opinion has on an attorney’s overall reputation. In other words, a lawyer is unlikely to be sloppy only with respect to his or her opinion. Rather, the attorney that is careless in drafting the opinion will likely be careless elsewhere. Conversely, with the exception of several attorneys who have distinguished themselves as “gurus” of opinion practice, being good at this is not likely to enhance anyone’s reputation.

Whether it’s opinions that come up or the contracts themselves or whatever . . . people tend to form views [as to] who’s good at this and who’s not good at this. . . . [B]ut in terms of real reputations of who’s an opinion guru you have people like

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263. *Id.*

264. FREUND, *supra* note 23, at 305 (“Most of us have been up against attorneys who were meek as lambs in connection with those elements of the agreement that concerned their clients, but turned into veritable tigers when they came to the section on legal opinions.”).

265. Interview with Attorney C-1, *supra* note 58, at 12.

266. *See id.* (“[M]y reaction, if I get that, is that I’d better be more attentive myself because I have less comfort that our inquiries made of the other side are going to be responded to fully—not because of any mal-intent, just inattention.”).

267. Hale & Dorr is now known as Wilmer Hale, following a merger with Wilmer, Cutler & Pickering. *See* <http://www.wilmerhale.com/about/history/> (last visited Feb. 19, 2006).

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Don Glazer, who have written treatises, they obviously have a profile in the Bar but beyond that I couldn't tell you who the good opinion writers of Sullivan & Cromwell are.<sup>268</sup>

In short, "no one becomes a rainmaker for writing opinions."<sup>269</sup>

If the value of an opinion lies in the fact that it is evidence that a reputable firm has represented the Company, one might also think that the most reputable firms could dispense with issuing opinions entirely. That is, they could—like investment bankers in the context of firm commitment public offerings—create value simply by their presence. The reputation of the firm alone would suffice as a signal of probity, diligence, etc. to the putative opinion recipient. Yet, this is not how it works out in practice. The fact that a firm already has a top-flight reputation does not exempt the firm from having to give opinions on behalf of its clients. As one practitioner observed, "[E]very firm that I know of—from Cravath on down—every firm that I have done deals with when they represent the borrower have given opinions . . . [T]here is no firm of which I am aware that practices in the commercial area that will not give opinions."<sup>270</sup> Conversely, firms appear reluctant to "sell" their opinions on a transaction, at least so long as they do not also do the other work involved in the transaction.<sup>271</sup>

### 3. Emotional Costs

The prospect of legal and reputational liability has, not surprisingly, led some lawyers to fear and/or loathe writing third-party closing opinions. Rather than viewing this as an opportunity to serve a client (and earn fees), lawyers often characterize the opinion process as an "aggravation."<sup>272</sup> Many lawyers interviewed seemed to view this aggravation as taking a greater emotional toll than other aspects of business law practice (e.g., negotiating and drafting the underlying agreements). As one lawyer who moved in-house from a partnership at a large firm observed, "When I was outside . . . there [wa]s a fairly significant level of anxiety if you [were] working on an unusual opinion in a large transaction."<sup>273</sup> This may be because "it's the lawyer's own ox that's being gored"<sup>274</sup> or, as one attorney prosaically explained, "When a lawyer signs an opinion, of any sort, he feels or she feels like . . . she's putting her ass on the line. In a way that it wasn't on the line by just pushing paper and reading

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268. Interview with Attorney W-3, *supra* note 205, at 12.

269. Interview with Attorney L-1, *supra* note 142, at 4; *see also* Interview with Attorney K-2, *supra* note 57, at 14.

270. Interview with Attorney B-1, *supra* note 111, at 6.

271. As Attorney B-1 observes, "if they want to hire [our firm] because they want to be able to deliver our opinion, then hire us to do the deal." *Id.*

272. *See, e.g.*, Interview with Attorney K-2, *supra* note 57, at 8.

273. Interview with Attorney M-2, *supra* note 86, at 17.

274. Interview with Attorney K-2, *supra* note 57, at 8.

contracts—in drafting contracts.”<sup>275</sup>

A related source of anxiety may be that opinion practice has become increasingly specialized and esoteric:

Just as a general corporate lawyer or commercial lawyer wouldn't try to draft an ERISA plan or a collective bargaining agreement. . . . [S]imilarly, I think that over the last several decades, opinion practice has become a highly specialized area of practice and has become recognized to an extent as an area of specialization and expertise. Most firms have their opinion gurus and people who spend a disproportionate amount of their time working on opinions, not only for their own deals. If you've got a hundred business lawyers in your group that do[es] a thousand transactions a year, you're not going to have each one doing 10 opinions.<sup>276</sup>

Discomfort with closing opinion practice may arise from a lack of history between lawyer and client. “You can really have some anxieties,” one lawyer explained, “when you know the client but you don't really know the client . . . [w]here the client is a small individual company say, or a startup.”<sup>277</sup> Although not “opinion shopping” in a traditional sense, it is nevertheless problematic because “these people could be gone tomorrow, but your opinion would still be here.”<sup>278</sup>

Closing opinion practice can be anxiety-producing even when the lawyer has a well-developed relationship with a client. One lawyer told a story of a long-time client that used a different firm for a complex transaction. Because the other firm did not have a long-standing relationship with the client, the other firm asked the client's long-time outside counsel to provide a due authority opinion in the transaction. The lawyer from the long-time counsel agreed, grudgingly, to do so.

[W]e had literally not been involved in the transaction—and so I wasn't really familiar with the documents, and I mean, it was a very peculiar situation to be giving an opinion. It was . . . as if I had dropped from the sky and given an opinion. And I felt very uncomfortable about it.<sup>279</sup>

For some lawyers—especially those for whom closing opinions are a significant portion of practice—the simpler closing opinions are less troublesome. A New York lawyer who frequently represents lenders indicated that closing opinion practice was not, itself, “that aggravating.”<sup>280</sup> This is because, in her view, “there is just a better understanding of what's

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275. Interview with Attorney F-1, *supra* note 251, at 17. When asked about liability, another attorney who began practice with a “white shoe” New York firm in the 1950s indicated that liability “was the whole name of the game even when I was there. It's not just something new . . . . You knew the firm could be sued if there were a mistake in a legal opinion. That was the end of your career if you got the firm sued because there was something in a legal opinion.” Interview with Attorney E-1, *supra* note 157, at 27-28.

276. Interview with Attorney L-1, *supra* note 142, at 5.

277. Interview with Attorney M-2, *supra* note 86, at 18.

278. *Id.*

279. Interview with Attorney K-1, *supra* note 102, at 17.

280. Interview with Attorney S-2, *supra* note 99, at 16.

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expected.”<sup>281</sup> Another lawyer indicated that even with respect to more complex true sale opinions in certain types of securitizations, closing opinion practice is less fearsome than it once was because “the law has become fairly steady in that area. . . . [T]he industry has reached a level of maturity where it is pretty clear.”<sup>282</sup>

Although the evidence is qualitative, and thus subjective, it would appear that closing opinion practice is less likely to create value when it involves enforceability opinions, or when (as is often the case) lawyers excessively limit or qualify their opinions. Although lawyer liability may be a source of value in that it imposes discipline, it presents an uncertain case for value creation, both because lawyers have historically not usually been liable for opinion errors per se, and because the costs (economic and otherwise) imposed on lawyers may exceed the lawyers’ compensation, indicating an externalization of transaction failure risk.

### IV. PATH AND PRIDE

If opinion practice exhibits inefficiencies, one might expect the market to be a source of innovative correction. Professor Gilson, for example, has argued that in the mergers and acquisitions context, innovation will occur in the marketplace so long as the cost of innovation is less than the resulting gains.<sup>283</sup> Professor Klausner has similarly argued that the market for contract terms will recognize efficiency gains by standardizing certain terms.<sup>284</sup> Yet, as discussed above, certain aspects of closing opinion practice appear to resist conventional market forces. Why might this be?

There are doubtless many answers to this question. Interviews with lawyers thus far suggest two. First, closing opinion practice is highly path dependent: Like technological changes, developments in closing opinion practice often come not from the market, but from standard-setting bodies, in this case, the bar associations. Second, certain features of this practice appear best explained by reference to the larger social context in which they are given, and in

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281. *Id.*

282. Interview with Attorney M-2, *supra* note 86, at 11-12. Interestingly, this attorney viewed *Enron*, or at least the *Enron* Examiner’s Report’s discussion of true sale issues, as having led to some of this stability. *See id.* at 11 (“[B]elieve it or not there is a great deal of guidance in the *Enron* reports.”). One lawyer explained that anxiety about closing opinions is exaggerated because “people like to worry themselves . . . . [They] read the *Wall Street Journal* and they see companies failing and opinions get mentioned and so it’s easy enough to worry.” Interview with Attorney W-2, *supra* note 56, at 15.

283. Gilson, *supra* note 5, at 253.

284. *See, e.g.,* Klausner, *supra* note 117, at 761 (“When the use of a contract term becomes widespread, its value may rise because of several phenomena. More judicial precedents can be expected, on average, to enhance the clarity of the term. Common business practices implementing the term may become established, further reducing uncertainty. Legal advice, opinion letters, and related documentation will be more readily available, more timely, less costly, and more certain. Finally, firms may find it easier to market their securities.”).

particular the power dynamics found among participants in common transactions. The “pride” of lawyers—their investment in their professional status, as well as their (and their clients’) relative bargaining power—may have as much to do with closing opinion practice as market forces.

#### *A. Path Dependence*

Part of the story may simply be path dependence among both clients and their lawyers. Here, path dependence refers to the “lock-in” that may occur with respect to certain types of technologies or entitlements.<sup>285</sup> Path dependence is an alternative to the market-adjusting standard economic model. “If such path dependence does occur,” Leibowitz and Margolis write, “it means that marginal adjustments of individual agents may not offer the assurance of optimization or the revision of suboptimal outcomes. In turn, this implies that markets fail.”<sup>286</sup>

##### *1. Plus Ça Change . . .*

Two types of change might occur in closing opinion practice. First, parties might agree to waive the opinion entirely if it is not cost-justified. This, however, apparently rarely happens (especially in financings) because “the people who are negotiating these transactions literally have a book in front of them [that] say[s] get this and they get that, and if you want to deviate from it[,] you are in fact forcing them above their pay level. They go to somebody else.”<sup>287</sup> One lawyer explained:

[I]t may be that the biggest thing is that we[']re into a tradition[,] and it’s very, very difficult to ever imagine breaking that tradition because the very people who ask for opinions [and], by and large, get them are financial institutions and others for whom nobody is ever going to take the chance at saying, “Oh, I don’t want to get an opinion in this particular situation.” What bank loan officer is ever going to say, “Oh, I didn’t get the opinion from the other counsel.” . . . [I]n essence, [there] is sort of that always basic question that our clients and everybody else asks, and there is a piece of this that says “[be]cause.”<sup>288</sup>

As discussed in Part III.A above, there is some indication that parties of equal bargaining power will waive the enforceability opinion outside the lending context. Yet, in the financing context, this is rare.<sup>289</sup> As one attorney

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285. See, e.g., S.J. Leibowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J. L. ECON. & ORG. 205, 206 (1995) (“[A] key finding of path dependence is a property of ‘lock-in by historical events’ . . . especially where those historical events are ‘insignificant.’”).

286. *Id.*

287. Interview with Attorney W-3, *supra* note 205, at 16.

288. Interview with Attorney S-1, *supra* note 87, at 1. “[T]he ultimate answer” to why lawyers write third-party closing opinions, one lawyer observed, “is a little bit like Teviah: It’s tradition. It’s the way it’s done.” Interview with Attorney W-3, *supra* note 205, at 16.

289. On whether clients have said to a lender that a borrower’s lawyer won’t offer an opinion, one attorney observed: “No. I think it is so well understood that it is a condition, an absolute customary



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explained:

[T]here is a movement afoot among some lenders who say “well, we’re not going to put people to the expense of giving an enforceability opinion—that’s really the dumbest of all the opinions.” And there is some movement afoot along those lines. But it’s limited. The reason is that people with the gold have—you know, it’s the golden rule.<sup>290</sup>

One might also expect that changes in the credit market and loan pricing would affect opinion practice. Thus, if banks are looking to place credit, or a potential borrower is an especially attractive customer, one might think that the opinion would be waived or modified. Lawyers, however, say this is not the case. Even when a lender has “so much money [they] don’t know what to do with it and their lending officers can’t shovel it out fast enough,” a closing opinion of borrower’s counsel is usually required.<sup>291</sup>

Among the attorneys, the resistance to change is often equally strong:

[U]ntil someone on high, says “this is the new form” then it’s hard for me to be the one to take it out. So why do I want to take it out when I know a smart client is going to look at it and go “gee, . . . every other law firm we use and every other document I see from everybody has this in it, how come we don’t have it?” . . . [Y]ou go down this whole pathway and you say “leave it in.”<sup>292</sup>

A second type of change might involve modifications to the language of the opinion. Economic theory would predict that lawyers will agree over time to increasingly standardized terms in closing opinions, and in these incremental changes efficiencies would result. To be sure, the form and substance of closing opinions have changed over time. As discussed below, however, it would appear that the principal engines of this change have been the bar associations, and not the market.

#### 2. The Bar Associations

To say that a practice is path dependent implies that the path started somewhere. In the case of closing opinions, that is a difficult point to locate. As discussed above, there is good reason to believe that closing opinion practice developed in connection with the municipal bond market in the late nineteenth century. But by its nature private, we have limited access to this history. At

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condition, I don’t think I’ve ever had that issue.” Interview with Attorney B-2 (May 7, 2004), transcript at 3. Another attorney, however, had a different experience:

What usually happens is the lawyer on one side or the other says to that client, “You know, there is an opinion requirement here[,] and I know you’re concerned about the cost of this transaction and the opinion is going to add appreciatively to it.” And [on] that side of the table is a discussion about pros and cons and then the business people talk and they say, “Okay, let’s get rid of it.” And sometimes that doesn’t work because sometimes the lawyer on the other side says[,] “No, really got to have an opinion here.”

Interview with Attorney K-1, *supra* note 102, at 2.

290. Interview with Attorney G-1, *supra* note 103, at 5. As discussed in Part IV.B, *infra*, this may also be evidence of “pride” in the form of a power imbalance between clients.

291. Interview with Attorney R-1, *supra* note 143, at 4.

292. Interview with Attorney G-2, *supra* note 142, at 2.

least historically, and like much of the practice of law, opinion-writing appears to have developed by apprenticeship rather than through more formal mechanisms.<sup>293</sup> “Office practice,” in Willard Hurst’s words, and not law schools—or bar associations—taught opinion writing.<sup>294</sup> Thus, through the middle of the twentieth century, writing third-party closing opinions was just one of many functions of the business lawyer, and there was scant published discussion of the practice.<sup>295</sup>

This changed in the wake of the *NSMC* scandal, discussed in Part II.B, *supra*, where a prestigious firm (White & Case) was sanctioned for the inappropriate use of third-party closing opinions. In 1973, attorney James Fuld argued that cases like *NSMC* indicated that attorneys should rationalize opinion practice by establishing “general principles regarding legal opinions.”<sup>296</sup> In Fuld’s view, such principles should consider:

- (a) what legal opinions should ordinarily be requested and given; (b) what words should ordinarily be used in opinions and what those words should mean; (c) what assumptions may ordinarily be made without expressly listing them; and (d) what investigation or backup is ordinarily required before a particular opinion is given.<sup>297</sup>

Fuld’s call was answered by the bar associations and private practitioners.<sup>298</sup> In 1979, the TriBar Committee<sup>299</sup> produced a “landmark”

293. See, e.g., Donald W. Glazer, *It's Time to Streamline Opinion Letters: The Chair of the BLS Committee Speaks Out*, BUS. L. TODAY, Nov.-Dec. 1999, at 32 (prior to 1970s, legal opinion practice was described as “more a matter of lore than of learned analysis.”) [hereinafter Glazer, *Streamline*].

294. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 303 (1950). Hurst has observed that first-party opinions—opinions rendered to one’s own client—became popular in the 1850s, when business clients sought advice from litigators about issues relevant to their business practices. More relevant may have been the “increasing effort to use law and lawyers preventively,” which Hurst indicates began after 1870. *Id.* at 302. How and why this occurred—and whether third-party closing opinions were a part of that story—will have to wait for another day.

295. In 1968, the Cleveland-Marshall Law Review published two brief pieces (one by a practitioner, one by a law student) on third-party closing opinions. See Gaspare A. Corso, Jr., *Opinions of Counsel: Responsibilities and Liabilities*, 17 CLEV.-MARSHALL L. REV. 375 (1968) (practitioner’s article); Linn J. Raney, Note, *Drafting and Use of Opinion Letters of Counsel*, 17 CLEV.-MARSHALL L. REV. 360 (1968). Despite this, in 1973, James Fuld, a prominent practitioner, observed that he could: find hardly any cases considering the substance and form of legal opinions; there is virtually no printed word on the subject in the law books or articles; so far as I know, neither the law schools nor the institutes for practicing lawyers consider the subject; and, unlike the accountants, the lawyers do not have any generally accepted principles covering opinions.

See Fuld, *Chaos*, *supra* note 126, at 915.

296. Fuld, *Chaos*, *supra* note 126, at 919.

297. *Id.*

298. See, e.g., Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion that Stock Is Duly Authorized, Validly Issued, Fully Paid and Nonassessable*, 43 WASH. & LEE L. REV. 863 (1986); Scott FitzGibbon & Donald W. Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to Do Business*, 41 BUS. LAW. 461 (1986); Donald W. Glazer & Scott FitzGibbon, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. CORP. L. 657 (1987); Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property*, 44 BUS. LAW. 655 (1989).

299. As discussed in note 6, *supra*, the TriBar Committee was originally composed of members of the state, county, and city bar associations of New York. TriBar has thus been viewed (at least historically) as representative of interests of New York lawyers and, in particular, banks and other financial services businesses, which tend to be the largest consumers of these types of legal services.

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report on opinion practice.<sup>300</sup> Not surprisingly, the TriBar Report tended to reflect the customs and preferences of the New York practitioners who wrote it.<sup>301</sup> Because the rest of the nation did not necessarily share these customs or preferences, local bar associations began to develop their own reports on opinion practice.<sup>302</sup> By the late 1980's, practitioners were "flooded with 'too many' sources of guidance."<sup>303</sup> "[E]ven when dealing with the same time-honored opinion language," an ABA report noted, "the opinion giver and the opinion recipient . . . may not have a common understanding of either what is intended by the opinion expressed . . . or what further legal or factual issues, if any, might be implicitly addressed by the language used."<sup>304</sup>

In order to reign in this continuing sense of chaos in third-party closing opinion practice, the Business Law Section of the American Bar Association appointed a committee to develop a national consensus on legal opinion practice. The project ultimately involved eighty lawyers, "representing a broad spectrum of practice and geographical area."<sup>305</sup> This group met from May 31, to June 3, 1989 in Silverado, California to "hammer out 'a national consensus'" on opinion issues.<sup>306</sup> The product of these meetings was ultimately endorsed by the Business Law Section of the ABA, and came to be known as the "*Accord*."<sup>307</sup>

The *Accord* did not create a standard, universal form of opinion, but rather sought to provide "a framework that is both sensible and fair. It has no official sanction and its use is voluntary."<sup>308</sup> The *Accord* created a "contractual mechanism" that would enable lawyers engaged in opinion practice to "bring[] themselves into accord on the meaning of standard opinion language and the work required to support it."<sup>309</sup> Specifically, the *Accord* provided "a detailed set of rules that defined for those who chose to adopt them how an opinion

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The TriBar Committee has broadened its membership to include members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, District of Columbia, and Ontario Bar Associations, and of the state bars of California, Delaware, Georgia, North Carolina, Pennsylvania, and Texas.

300. See Koley Jessen, P.C., *Third-Party Legal Opinions: An Introduction to "Customary Practice,"* 35 CREIGHTON L. REV. 153, 159 (2001) (citing *TriBar 1979 Report*, *supra* note 6).

301. *Id.*

302. Interestingly, Hawaii was among the first state bar organizations to do so. See Raymond Iwamoto, *Third-Party Opinion Letters*, 7 HAW. B.J. 27 (Feb. 2003) (citing *Borrower's Counsel's Opinions to Lenders*, 20 HAW. B.J. 129 (1987)).

303. See Glazer, *Streamline*, *supra* note 293, at 33.

304. See *Accord*, *supra* note 11, at 169.

305. Koley Jessen, *supra* note 300, at 160 (quoting George W. Bermant, *Third-Party Legal Opinions*, C533 ALI-ABA 1337, 1351-1352 (American Law Institute—American Bar Association Continuing Legal Education, 1990)).

306. See *id.* (quoting George W. Bermant, *Third-Party Legal Opinions*, C533 ALI-ABA 1337, 1352 (1990)).

307. See *Accord*, *supra* note 11. As discussed therein, the *Accord* also contained the *ABA 1991 Guidelines*.

308. See *Accord*, *supra* note 11, at 171.

309. See Glazer, *Streamline*, *supra* note 293, at 33.

letter should be interpreted, the laws it should be understood to cover, the factual investigation the opinion giver was expected to conduct and the meaning of several standard opinion clauses.”<sup>310</sup>

Although one prominent practitioner viewed the *Accord* as having had a “profound effect on opinion practice,” it also “never caught on.”<sup>311</sup> Part of the problem may have been the voluntary nature of the undertaking: if the parties’ lawyers did not expressly agree to adopt the *Accord* in full, it would not apply, or may not apply as it was intended to apply. Indeed, it may have produced the opposite of the result intended. Rather than streamlining negotiations about opinions, “opinion letters often became longer and negotiations . . . more difficult. The added complexity, however, rarely made opinion givers feel more comfortable.”<sup>312</sup>

A related, perhaps more instrumental, problem was that the *Accord* was viewed as favoring opinion-givers (e.g., borrower’s counsel).<sup>313</sup> Since this conflicted with the pro-recipient (e.g., lender) orientation of the TriBar Committee, many underlying problems remained. The *Accord* was, according to one attorney interviewed, simply too “radical” for the financial institutions that dominated many of the bar association committees that might have been involved with it.<sup>314</sup>

[I]f you [were] creating the legal marketplace anew, it might make a lot of sense to have something like [the *Accord*]; and the lawyers who participated in that project, were a very high quality bunch of lawyers. I know most of them. They thought what they were doing made sense obviously, or else they wouldn’t have spent as much time as they did producing that product. But the financial institutions just said, “No. We want the language we’re used to, we may have to argue about what it means if we ever have to litigate but we’re not going to the *Accord*.”<sup>315</sup>

Real cohesion would not come to opinion practice until 1998, when the TriBar Committee released its second major report. While “generally consistent” with its prior reports, the 1998 report also “reexamine[d] and replace[d]” its predecessor.<sup>316</sup> At about the same time, the American Law Institute developed its Restatement (Third) of the Law Governing Lawyers,<sup>317</sup> which was viewed as “generally compatible with the bar

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310. *Id.*

311. *Id.* at 34.

312. *See id.* (noting that “[o]pinion preparers recognized all too well the impossibility of stating everything and worried that the more they stated, the more difficult it would be to claim that something unstated was intended to apply anyway”).

313. *See* Koley Jessen, *supra* note 300, at 162 (noting “it is clear from our practice that counsel to opinion recipients felt the *Accord* favored opinion givers and, as a result, such counsel objected more often than not to its unfettered use”).

314. As one lawyer explained, “I think [the *Accord*] was such a radical departure from the kind of customary practice that the financial institutions just unanimously rejected it; probably without even focusing on . . . the specifics.” Interview with Attorney B-1, *supra* note 111, at 15.

315. *Id.*

316. *TriBar 1998 Report*, *supra* note 6, at 592.

317. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 (2000).

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reports.”<sup>318</sup> In addition, the ABA released its “Legal Opinion Principles,”<sup>319</sup> which set forth fifteen statements intended to govern opinion practice, and to act as “a bridge between the Restatements’ description of applicable legal standards and the extended discussion of legal-opinion practice in the various bar-association reports.”<sup>320</sup> The reconciliation between the TriBar Committee and the ABA was complete with the assertion in the Restatement that the *TriBar Report* and the ABA’s *Legal Opinion Principles* were “the two ‘leading’ bar-association reports” on closing-opinion practice.<sup>321</sup>

Although it is difficult to compare bar association influence in different practice areas, there is anecdotal evidence that opinion writing is unusually susceptible to reform and innovation through these quasi-regulatory bodies. Today, opinion practice appears to be the subject of intense and active bar association input. The Business Law Section of the American Bar Association, the TriBar Committee, and the Business Law Sections of several states, including Arizona, California, Pennsylvania, Texas, and Washington, have released many detailed reports on opinion practice.<sup>322</sup> These committees are often populated with attorneys who have been recognized as experts in opinion writing, some of whom have authored important works on the subject.<sup>323</sup> These committees then routinely assess and debate opinion practice—sometimes heatedly. Often, they issue reports and model opinion letters for use by “generalist” practitioners.

The bar associations play a complex part in closing opinion practice. They have become a focal point for the production and promulgation of standards that lawyers can meet in closing opinion practice. They exert what would appear to be a significant influence in the ways that lawyers conceive of closing opinion practice. And although the bar associations may not be the “market” in a traditional sense, they certainly influence market behavior in important ways.<sup>324</sup> Of course, some paths may be so strong that the bar associations cannot change their course. The *Accord*, for example, apparently could not overcome the force of deeply ingrained New York opinion practice.

Moreover, it is important not to overstate the role that path dependence plays here. Any path dependence explanation risks missing the complex

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318. Arthur Norman Field, *Legal Opinions and the Restatement, The Law Governing Lawyers*, 609 PLI/LIT 115, 117-18 (PLI Lit. & Admin. Prac. Course Handbook Series No. H0-003Q, 1999).

319. Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998).

320. Glazer, *Streamline*, *supra* note 293, at 36.

321. *Id.*

322. Glazer lists over thirty-five different such reports in the current treatise. See GLAZER, OPINIONS, *supra* note 2, at xxv–xxxiv, xxxix–xlvi.

323. Examples include Donald Glazer and Arthur Field, among others.

324. See, e.g., Interview with Attorney G-1, *supra* note 103, at 5. As noted above, there is a sense among lawyers that certain of these groups—the TriBar Committee in particular—have been “captured” by market actors (e.g., banks) seeking to establish beneficial standards.

interactions between lawyers and their clients that contribute to developments in closing opinion practice over time. As discussed in Parts II and III, *supra*, we know that in certain respects, and under certain circumstances, closing opinion practices will change.<sup>325</sup> To read bar association and other professional literature, one might imagine that closing opinions are generated as responses to transactions presented by clients, that closing opinions are, if not an afterthought, then at least an exogenous statement about the transaction, authoritative because of their independence from the transaction. As discussed above, however, lawyers note that closing opinions are almost always negotiated, and that sometimes individual transactions will change due to information produced in the opinion process.

Moreover, and more generally, it would appear that closing opinion practice functions in a way that informs (and perhaps modifies) expectations over time. That is, closing opinion practice is not a static feature of transacting, but can shape transactions. Even though “encrusted”<sup>326</sup> on the “checklist,” closing opinion practice is also a part of the “checks and balances” of complex transactions.<sup>327</sup> According to one attorney,

[The closing opinion sets forth the] rules of the game. Here is the scorecard, fit the box. And if you’re not going to fit the box and you’re not going to be able to do it so it looks like it’s going to be checked, that box will start early to tell everyone that it [the transaction] doesn’t fit. So, you can fix it . . . [o]r you abandon it and do something else that will fit.<sup>328</sup>

### *B. Pride*

If closing opinion practice follows a path created or maintained, at least in part, by the bar associations, what explains the bar associations? One explanation may be “pride.” Pride is an admittedly vague term that refers to the loose collection of social and emotional forces that appear to influence the way closing opinions are written and some of the purposes they serve.<sup>329</sup> It reflects

325. There also appears to be a sort of market innovation in Europe. Several lawyers indicated that legal cultures that had previously viewed the U.S. division of labor with respect to closing opinions suspiciously are beginning to change their tune. One lawyer explained, “I asked the sophisticated German firms,” if they would provide enforceability opinions as to their clients. Interview with Attorney S-1, *supra* note 87, at 2.

[T]his guy told me it was unethical . . . but, guess what, none of our clients can borrow money from United States banks if they didn’t provide these. So we’ve just sort of gotten to the point that we kind of hold our nose and say we don’t think it’s that unethical and go forward.

*Id.* This may reflect the broader influence that many aspects of U.S. culture have abroad. As one lawyer explained, “U.S. legal practice has now pervaded other jurisdictions . . . sort of like McDonald’s hamburgers and Starbucks coffee.” Interview with Attorney C-2, *supra* note 78, at 3.

326. Interview with Attorney W-3, *supra* note 205, at 16.

327. Interview with Attorney M-2, *supra* note 86, at 13.

328. *Id.*

329. Theoretical discussions of this phenomenon can be found in, e.g., ROBERT MERTON, *SOME THOUGHTS ON THE PROFESSIONS IN AMERICAN SOCIETY* 11 (1960) (explaining that professional organizations do not require members to “feel altruistic . . . it only requires them to act altruistically”);

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the assertion of self in a social setting even when doing so may produce no net economic gain for oneself or one's client.

In the case of the bar associations, pride would describe the ambitions of the institutions, themselves, as well as their individual members. Although a full-blown discussion of the bar associations is beyond the scope of this paper, it would appear that they have had an important, if complex, role in the development of modern legal practice, generally. On the one hand, the bar associations appear to have diminishing power to regulate law practice.<sup>330</sup> For example, bar associations no longer control attorney advertising or set minimum fee schedules.<sup>331</sup> While bar associations may once have reflected an "iron law of oligarchy,"<sup>332</sup> they today have a weakened grip on the macro-economics of law practice.

On the other hand, they have had increasing influence in the continuing professional education of lawyers.<sup>333</sup> The bar associations have become "heavily involved in developing and interpreting standards of professional conduct for lawyers" and also have played "significant roles in enforcing the standards."<sup>334</sup> Establishing standards for closing opinion practice is an important part of this effort. Thus, lawyers craft opinions "in order to be thorough, accurate and follow guidance provided by various bar associations."<sup>335</sup> Lawyers interviewed for this project appear to have been heavily influenced by the efforts of the bar associations.<sup>336</sup> It may be that education—including on the manners and morals of third-party closing opinions—has replaced monopoly control as the *modus vivendi* for the bar associations.<sup>337</sup>

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ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (rev. ed. 1968); TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34, 43-46 (rev. ed. 1964) (discussing roles that the desire for success, self-interest, and altruism play in professional institutional structure).

330. See ROBERT L. NELSON & DAVID M. TRUBEK, *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 7 (Robert L. Nelson et al. eds., Cornell 1992) ("[T]he profession's associations appear increasingly irrelevant to the actual organization of law practice.").

331. *Id.*

332. ROBERT MICHELS, *POLITICAL PARTIES* 401 (Eden Paul et al. trans., 1949).

333. See, e.g., MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988).

334. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 *YALE L. & POL'Y REV.* 193, 206, 212-13 (1996).

335. Koley Jessen, *supra* note 300, at 154.

336. Virtually every lawyer interviewed for this project was aware of the major TriBar and ABA efforts in the closing opinions context, and many viewed these efforts positively. See, e.g., Interview with Attorney M-2, *supra* note 86, at 21 ("[T]he ABA guidelines . . . are very highly thought of and their corporate governance [principles are] very highly thought of.").

337. Certainly, it would appear that the bar associations enable "entrepreneurial" lawyers to "produc[e] precedents, principles, doctrine [and] institutions" which enable lawyers to "reinforce their position in the market of trade services." See Yves Dezalay, *Putting Justice 'into Play' on the Global Market: Law, Lawyers, Accountants and the Competition for Financial Services* 17 (unpublished manuscript presented at Law & Society Annual Meeting, Madison, WI, June 11, 1989) (quoted in

One result of the increased presence of bar associations in the development of third-party closing opinions has been the “expertizing” of opinions. A comparatively small coterie of opinion “gurus” sits on these committees, both at the state and national level. They apparently know one another, either personally or by reputation, and often collaborate on opinion-related bar association projects.<sup>338</sup> These gurus are not remunerated in any direct or significant way for the service they provide. While there are undoubtedly many reasons for volunteering in this way, one reason is likely to be a kind of pride, both civic and personal.<sup>339</sup>

We can also see this notion of self-expression at work more generally in closing opinion practice. A number of lawyers—especially those representing borrowers—asserted that there was a strong link between the leverage associated with being the financing (e.g., lending) party and the power to demand a third-party closing opinion from the other party’s (e.g., borrower’s) lawyer. This was sometimes simply chalked up to what several lawyers called the “golden rule.”<sup>340</sup> As one lawyer explained, “[T]o the borrower, the money is essential. To the lender, sure he wants to do a deal and make some money, but if he doesn’t lend money to me, he can lend it to you. If I don’t get it from you, I may not be able to get it from anybody else.”<sup>341</sup>

One lawyer observed that leverage also plays a role in dividing the labor in opinion practice:

[I]f both sides are asked to give essentially the same opinion regarding either enforceability, the remedies opinion, or due authorization, etc.—there is a view that well, each one of us can do the due diligence and not necessarily rely on those client’s representations and warranties in the agreement and therefore neither of us will give the opinion because it would typically be mutual.<sup>342</sup>

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Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 427 (1993).

338. In describing the development of the Opinions Committee of the California Bar Association, one attorney explained that the Executive Committee of the Section of Business Law “decided that what California really ought to have [wa]s a standing opinions committee [with] TriBar people without term limits. People who would be on . . . [are] people who are well-versed in opinions.” See Interview with Attorney C-1, *supra* note 58, at 3.

339. One attorney explained as follows:

The reason that I do the bar association work, and the reason I think most of us do it, is because, first, we like the intellectual stimulation of it, second because of the collegiality, working with good people, and third we’re producing something of value, but not necessarily in that order.

Interview with Attorney G-1 (Dec. 5, 2005), transcript at 1.

340. In fact, legal opinion practice reflects two distinct (perhaps contradictory) “golden rules.” One is, as indicated, that the financing party may have and exert the leverage to obtain an opinion, even if it is not economically advantageous to do so. Second, there is the almost Mosaic golden rule which says that an opinion giving lawyer “should not be asked to render an opinion that counsel for the opinion recipient would not render . . .” but should not “refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations. . . .” *ABA 2002 Guidelines*, *supra* note 11, § 3.1, at 878.

341. Interview with Attorney H-1, *supra* note 152, at 5.

342. Interview with Attorney K-3, *supra* note 85, at 2.



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Where the parties do not have equal power, however, the result may be different. For example, lawyers who give opinions, and those who counsel their recipients, were incredulous at the suggestion that the lawyer for the bank (or other financing party of any significance) would also provide an opinion. Even when it was pointed out that questions of the bank's authority and enforceability should, in theory, matter to borrowers under a revolving credit agreement, it was simply inconceivable that the bank's lawyers should provide a reciprocal opinion assuring the borrower that the bank would have the power and authority to make advances available in the future, as contemplated by the loan agreement. As one lawyer explained:

In the lending transaction, it's never mutual. The borrower will never receive an opinion from lender's counsel [on] the lender's obligations [under] that agreement to lend in the future . . . . You never get that opinion and you just rely on the covenant of the lender to lend under the conditions set forth in the agreement. . . . There are lots of historic reasons, I'm sure, but I think leverage has a lot to do with it. The fact [is] that this is one of the conditions that the lender has put on it and that makes it a condition that the borrower will accede to to get the money.<sup>343</sup>

In short, there may be a kind of endowment effect that gives the liquid parties—and their lawyers—the negotiating power to demand that borrowers or sellers provide closing opinions, even when it may not make economic sense.<sup>344</sup> Having the money gives the financing party an entitlement with which it does not wish to part. This leverage in the deal may be reflected in the distribution of opinion-writing duties.

Leverage does not just run between parties. There is also a power dynamic between lawyer and client which may influence closing opinion practice. As discussed above, clients appear generally to have little patience with closing opinion problems. Yet, they do want their lawyers to issue closing opinions in order to see their deals consummated. One lawyer speculated that this may in part have explained how Enron's law firms were induced to give closing opinions on questionable transactions:

[I]f you go back to 1999 and . . . your client Enron is widely regarded in every book that gets published as one of the most respected companies in America, its accountants Arthur Andersen are regarded as one of the most respected accounting firms in America, and if these people tell you you need to do something in order to comply with generally accepted accounting principles, and you review the law and determine that the source of the opinion is supported by the law, I [would] give that opinion, you know.<sup>345</sup>

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343. *Id.* There are, to be sure, aberrant cases. In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the Supreme Court of Texas held that counsel to a lender (a savings and loan association) could be liable for negligent misrepresentation for having incorrectly opined on the enforceability of an agreement settling a litigation with a borrower.

344. The "endowment effect" reflects the tendency for individuals to value items more when they own them than when they do not. See Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 44 (1980).

345. Interview with Attorney B-1, *supra* note 111, at 5.

Finally, pride refers to the professional pride that lawyers frequently say they take in closing opinion practice. Several lawyers said that they took opinion writing seriously not because they were concerned about producing information or incurring liability, but because it is inherent in the professional nature of lawyering.<sup>346</sup> “It’s not so much liability” that concerns lawyers, one explained, “it’s professional pride.”<sup>347</sup>

Another lawyer (from New York) had a similar, and similarly complex, view of the role that professional pride plays in closing opinion practice. “I think [closing opinion practice] imposes discipline because of liability,” she said:

but I do not think . . . that a lawsuit is common on an opinion. I think it goes to doing your job well, that is[,] you are representing a client and part of the representation is delivering a third-party opinion or receiving one and negotiating one. I think, though, it imposes discipline that way and I think on reputation, it is both the reputation of the firm and sort of delight in the work that we do . . . I think a legal opinion is pure legal work and in a transactional world, some of what we do is more business oriented, or you might do a great job on the legal work and a covenant, but have to re-negotiate it in a way that is acceptable to all the parties, not just you. [B]ut a legal opinion is pure you, legal thought.<sup>348</sup>

#### V. CONCLUSION: FURTHER INQUIRY

Writing third-party closing opinions is not quite like other fields of business law practice. When a lawyer delivers a third-party closing opinion, she is placing herself in harm’s way to a greater extent than in perhaps any other aspect of business law practice. While courts have understandably developed doctrinal mechanisms to limit or disperse these risks, it nevertheless appears that opinion-practice creates legitimate concerns for lawyers in ways that other features of practice (e.g., negotiating and drafting documents) do not.

The preliminary research contained in this article suggests that there are both economic and non-economic explanations for this practice as it currently exists in the United States. As an economic matter, due authority opinions and certain subspecies of no-violations opinions appear to aid the due diligence process by compelling the best-positioned lawyer to provide this analysis. Closing opinion practice, with respect to these matters, distributes value-adding informational burdens in a way that no other transactional feature could.

There are, however, limits to the economic explanations. It appears that certain common features of opinion practice are often not cost-justified,

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346. See Interview with Attorney G-1, *supra* note 103, at 14. This can border on the religious. “‘Duly incorporated,’ ‘duly authorized,’ ‘valid and binding,’ and the like,” one leading work observes, “are canonical phrases by which corporate lawyers consecrate financial transactions. Their delivery is a rite of closing.” See GLAZER, *OPINIONS*, *supra* note 2, § 1.4, at 14.

347. Interview with Attorney G-1, *supra* note 103.

348. Interview with Attorney S-2, *supra* note 99, at 10.

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whether in themselves or because of the costs they impose on lawyers. Moreover, the market appears to fail, in the sense that these features of opinion practice appear highly resistant to negotiated modification. And, of course, recent scandals remind us that the obligation to provide a third-party closing opinion is no assurance of the probity of the client or the lawyer. This Article has thus argued that price theory alone cannot explain this practice. The attorneys I have interviewed suggest that path dependence and a kind of “pride” are also at work.

Other theories may also be worth pursuing. There may, for example, be behavioral explanations of certain of the “irrational” features of closing opinion practice (i.e., the “pride” described above).<sup>349</sup> Closing opinions may also serve “gatekeeping” functions, which, some argue, should apply more generally to lawyers.<sup>350</sup> Indeed, virtually any theoretical approach to law may be enriched by application to closing opinion practice. Thus, this Article should be viewed not as the last, but as perhaps a first, word on third-party closing opinions.

For those who care about how and why lawyers do what they do, there is much more work to be done in this arena. First, there are a number of interesting empirical avenues to pursue. This study has relied to a large extent on interviews with lawyers who have identified themselves as having an interest (and perhaps expertise) in opinion writing. It may be equally (or more) interesting to ascertain the views of non-expert lawyers (to say nothing of clients). Another empirical inquiry would consider more deeply the influence of the bar associations in this process. Does the “average” practitioner know or care about the most recent TriBar or ABA developments? If so, how are those developments used?

Second, we have yet to develop a full and useful history of this practice. Given that history (or at least “tradition”) is so frequently cited as the basis for the existence and contours of the practice, it would be useful to have a better understanding of the past. It may be possible to work through older documents (especially from the municipal bond issuances of the late 19th century) and obtain a more thorough understanding of how the practice came to be.

Third, we have no particularly good theory of liability in this context. As discussed in Part III, above, courts have come to curious and inconsistent results in this context, which may reflect a desire to protect lawyers. If, however, we are experiencing a larger change in the role of lawyers and legal opinions, then associated liability rules may also change. If the proper role of opinions is to produce and verify information in a cost-effective manner, then perhaps the predominant question should focus on that, rather than technical

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349. Professor Painter does a bit of this in his article about the *NSMC* scandal. See Painter, *supra* note 125.

350. See, e.g., Coffee, *supra* note 249.

details or other potentially extraneous matters (for instance, the client's misconduct). A related question would consider the role that insurance does (or should) play in this context. Why has the insurance policy not displaced the legal opinion?<sup>351</sup>

There is, in short, good reason to view this Article as merely a preliminary study. This Article has demonstrated that there is some reason to believe that closing opinions add economic value under certain circumstances, thereby bolstering traditional economic analysis. It has also shown that this analysis is incomplete, at least in this context. There is much more work to do here. While we may have begun to understand why this practice exists, we have only scratched the surface.

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351. Indeed, we might see increasing use of such policies, e.g., in the secured lending context, where such products as "First American's Eagle 9 UCC" insurance policy allegedly displace the role of closing opinions on the perfection and priority of personal property security interests. *See* Eagle 9 UCC Insurance Policy, Frequently Asked Questions, <http://www.eagle9.com/faq.html> (2005). First American explains that its product is better than a legal opinion because, among other reasons:

First of all, the opinion of borrower's counsel is usually directed only to perfection. Our insurance products cover priority. Further, usually the perfection opinion is little more than advice that the form of the financing statements meets the particular state's requirements as set forth in the CCH Secured Transactions Guide. Given the fact that lender's counsel prepares the financing statement, the opinion is being asked of the wrong lawyer and, getting over that issue, is generally useless.

*Id.*; *see also* Widen, *supra* note 176, at 1577, 1577 n.2.

## Third-Party Closing Opinion Practice

### APPENDIX

#### A NOTE ON METHODOLOGY

The empirical aspect of this project relied principally on interviews with twenty-seven lawyers, supplemented by email exchanges or less formal conversations with several others. Most of those formally interviewed identified themselves as having an active interest in third-party closing opinion practice. Most were employed at large U.S. law firms in major metropolitan markets (e.g., New York, Los Angeles, Washington, D.C.), although several were employed with smaller regional or local firms (one from Maine, one from Phoenix, and one from Memphis). Roughly one-third of interviewees identified their practices principally as counsel to opinion recipients (e.g., banks, asset purchasers), one-third identified their practices principally as being the opining attorney, and one-third indicated a blended practice. Twenty were men; seven were women. All but one was Caucasian (the exception was Asian). One was not a business lawyer at all, but counsel to a large malpractice insurer.

Each interview lasted about an hour and was conducted from a script of questions I developed, which can be provided upon request. The interviews were all tape-recorded and transcribed. All interview participants were asked to—and did—sign consent forms in which, among other things, they agreed to be interviewed and indicated whether they would permit attribution of quotes. Despite the agreement to be interviewed and quoted, many asked that their quotes not be attributed to them. As noted in the introduction, in order to preserve their anonymity while also maintaining the integrity of the data, I have cited them by code, e.g., Interview with Attorney [A-1] (date), transcript at [ ].” Redacted transcripts of these interviews were provided to the *Berkeley Business Law Journal*. In addition to obtaining consents, I also (grudgingly) obtained institutional review board approvals and/or waivers from the academic institutions with which I was associated while conducting this research.

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